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A Corporation Has No Soul — The Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate

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A CORPORATION HAS NO SOUL—THE BUSINESS ENTITY LAW RESPONSE TO CHALLENGES TO THE PPACA CONTRACEPTIVE MANDATE

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ABSTRACT

The most contentious matter in the implementation of the Patient Protection and Affordable Care Act is not one of health care, but rather one of the law of business organizations. Numerous for-profit business organizations have challenged the portion of the PPACA and its related regulations requiring that group health insurance plans provide, on a no-cost sharing basis, coverage for a variety of procedures and prescription medicines involving contraception and what some describe as "abortificants." In these suits, the various business ventures and their owners assert that they should be exempt from the requirement of the mandate on the basis that, inter alia, compliance therewith would violate the religious beliefs of the organizations' ownership and management. The problem with this position is that it treats the business entity as the nominee of either its ownership or management, asserting that what is done by the organization is in effect done on their behalf. This paradigm is not, however, consistent with the law of business organizations where the business entity is a legal person distinct from its shareholders or investors. Alternatively, it is claimed that the religious beliefs of the organization itself are violated by the mandate. Again, this argument fails on the basis that a business organization does not have religious beliefs. Rather, as has been famously put, "a corporation has no soul."

Ultimately, these lawsuits fail as a matter of standing; the owners are not subject to the mandate, and the corporation or other business entity has no religious views violated thereby.

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INTRODUCTION

The most contentious matter in the implementation of the Patient Protection and Affordable Care Act (PPACA) is not a question of health care, but rather one of the law of business organizations. The dispute has been over the requirement that group health insurance plans provide, on a no-cost sharing basis, coverage for FDA-approved contraceptive procedures and prescription medicines; for purposes of this Article, this requirement is labeled the "Mandate."[1] Essentially, in one class of suits, various employers—each an expressly religious organization such as the University of Notre Dame[2] or a Catholic dioceses or archdioceses[3]—have challenged the application of the Mandate to them on the basis that the drugs and procedures required by the Mandate conflict with their religious beliefs, and therefore they must be exempt therefrom on constitutional grounds. Consequent to an expansion of the regulatory exemption from the Mandate occasioned in February 2013, these expressly religious organizations are now exempt from the Mandate.[4]

The regulatory exemption from the Mandate for expressly religious organizations, which itself is not constitutionally required,[5] will significantly

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[1] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. §§ 18001–18121 (2012)), as amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152 (March 30, 2010). To a limited degree the challenges have also involved objections to a requirement to cover "lifestyle" drugs such as Viagra and Cialis. *See*, *e.g.*, Complaint ¶ 20, M.K. Chambers Co. v. Sebelius, 2013 WL 1340719 (E.D. Mich. Apr. 3, 2013) (No. 2:13-cv-11379-DPH-MJH). This "Mandate" is separate and distinct from the "Individual Mandate" of § 1501 of the PPACA. The Individual Mandate requires, subject to certain exceptions, that beginning in 2014 all persons either be covered by a federally-approved insurance policy, either purchased directly or acquired through employment, or pay certain penalties. The Supreme Court upheld the Individual Mandate on the basis of Congress's powers under the taxing clause. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[2] Univ. of Notre Dame v. Sebelius, No. 3:12CV253RLM, 2012 WL 6756332 (N.D. Ind. May 21, 2012).

[3] *See*, *e.g.*, Roman Catholic Archbishop of Washington v. Sebelius, 920 F. Supp. 2d 8 (D.D.C. 2013); Roman Catholic Archdiocese of N.Y. v. Sebelius, 907 F. Supp. 2d 310 (E.D.N.Y. 2012).

[4] *See infra* notes 47–71 and accompanying text.

[5] There is no constitutional requirement to create a regulatory exemption from the application of the Mandate. Although exemptions may, on appropriate facts, be necessary to accommodate constitutional protections, it does not follow that those exemptions must be statutory or regulatory. *See*, *e.g.*, Reynolds v. United States, 98 U.S. 145, 167 (1879). *See also* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1120–21 (1990). The exemption serves as a political accommodation

reduce the need for judicial determinations of exemption based upon Free Exercise rights.[6] Undoubtedly, there will continue to be fact specific disputes regarding the application of the exemption to particular organizations asserting that they are "religious employers."[7] The primary continuing dispute is upon the demands for exception from the Mandate made on behalf of non-religious, typically for-profit, organizations.[8]

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in response to expected constitutional challenges, in effect conceding that entities falling within its scope likely would prevail in a dispute to the merits on whether the Mandate, as applied, violates the Free Exercise rights of those within its scope. To provide but one additional example of a legislative exemption, during the pendency of the 18th Amendment enacting prohibition, wine remained available for sacramental purposes. *See* National Prohibition (Volstead) Act, 27 U.S.C. § 16 (1919) (repealed 1935). *See also* Perry Dane, *Exemptions for Religion Contained in Regulatory Statues*, *in* 1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 559 (Paul Finkelman ed., 2006).

Excessively broad regulatory exemptions from the application of the Mandate themselves give rise to constitutional challenges. A determination to extend an exemption from the Mandate to "any for-profit corporation that self-certifies that it violates the religious beliefs of the majority of the shareholders" or "any for-profit corporation that meets criteria X, Y and Z" would raise a host of problems. First, excessive deference to religious views may create Establishment Clause problems. *See*, *e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982); *see also* Corp. of the Presiding Bishops of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 349 (1987) (O'Connor, J., concurring) (questioning whether exemption of religious corporation's for-profit activities constitutes a violation of the Establishment Clause); Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). Second, setting and weighting criteria as to what does or does not constitute a sufficiently religious corporation in itself creates Establishment problems in defining what is and then, by implication, what is not a religion. *See infra* note 134. These concerns will not be further addressed in this Article.

[6] U.S. CONST. amend. I [hereinafter Free Exercise Clause] ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....").

[7] *See infra* notes 40–71 and accompanying text.

[8] As detailed below, for-profit ventures have no basis for claiming an exemption from the Mandate based upon religious beliefs. It does not follow, and the author expressly rejects the notion, that the for-profit/non-profit divide is the appropriate starting point for determining that ventures may ab initio seek exemption from the Mandate. The taxonomy of non-profit ventures is a more involved process than is that for for-profit ventures. For example, many dioceses and archdioceses are organized as "corporation's sole," an organizational form that is a corporation in name only. Being the bishop or archbishop, it would be difficult to contemplate a situation in which it could not properly be said that a "corporation" has a religious belief protected by the Free Exercise Clause. A § 501(c)(3) or (4) sponsored and operated by a religious body is the next step in the progression, and then there is the § 501(c)(3) or (4) that has a relationship to a religious body but which is not directly operated by it. These questions, all terribly complicated, will need to be addressed elsewhere.

This second class of suits, and those subject to this discussion, were not filed by religious organizations but rather by for-profit business ventures,[9] asserting that they should be exempt from the requirements of the Mandate on the basis that, inter alia, compliance therewith would violate the religious beliefs of the organization's ownership and management.[10] The problem with this argument is it treats the business organization as the nominee of its ownership or management, asserting that what is done by the organization is in effect done on their behalf. That paradigm is not, however, the law of business organizations.[11] Alternatively, it is claimed that the religious beliefs of the organization itself are violated by the Mandate. This argument fails because a business organization does not have religious beliefs. Rather, as it has been famously put, "a corporation has no soul."[12]

Ultimately, this is a question of standing. Not addressed herein is whether the Mandate is a burden on Free Exercise, whether that burden is substantial, and whether the burden—even if substantial—is narrowly crafted to satisfy a compelling interest, all of which would be necessary to prevail on a Religious Freedom Restoration Act challenge.[13] Ultimately, those questions do not need to be resolved. Rather, by applying settled principles of business organization law, it is clear there is no natural or juridical person whose Free Exercise rights are burdened by the Mandate.

This Article will first review the development of the Mandate and the steps involved in arriving at the final regulatory exemption therefrom for "religious employers." Part II will review the various challenges brought by for-profit ventures to the Mandate, address the Free Exercise Clause rights of business entities and the limited case law on the business entity being treated as the mere nominee of the owners in the discharging of its legal obligations. Part III will review the positive law of business organizations, which is premised upon the distinctions between the owners and the entity, they being recognized at law as distinct jural persons. Part IV will address the application

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[9] *See*, *e.g.*, Annex Med., Inc. v. Sebelius, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013) (medical devices); Eden Foods, Inc. v. Sebelius, 733 F.3d 626 (E.D. Mich. 2013) (natural foods company); Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) (HVAC equipment); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1284 (W.D. Okla. 2012) (arts and crafts stores); Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., No. 2:12-CV-92-DDN, 2012 WL 6738489 (S.D. Mo. Dec. 31, 2012) (farming, dairy, creamery, and cheese-making); Complaint at 2, Armstrong v. Sebelius, No. 1:13-cv-00563 (D. Colo. filed Mar. 5, 2013) (residential mortgage banking company).

[10] *See infra* notes 72–76 and accompanying text.

[11] *See infra* notes 77–104 and accompanying text.

[12] *See infra* note 133 and accompanying text.

[13] Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2006).

of settled principles of business entity law to the arguments of those who contend the Mandate violates the rights of either the entity or its owners, demonstrating each argument is facially and fatally flawed. The Conclusion is based on the venerable rule *damnum absque injuria*.

I. THE PPACA MANDATE

A. Pre-PPACA Efforts to Require Coverage of Contraception

In *General Electric Co. v. Gilbert*, the Supreme Court held that an employer's disability benefits plan did not violate Title VII of the Civil Rights Act of 1964[14] by not providing disability benefits for the period employees were absent from work due to pregnancy.[15] Congress responded by passing the Pregnancy Discrimination Act of 1978, amending Title VII "to prohibit sex discrimination on the basis of pregnancy."[16] This legislation did not, however, require coverage for contraception, whether by means of prescription drugs or surgically.

In 2000, the Equal Employment Opportunity Commission (EEOC) pronounced that employers must cover the expenses of prescription contraceptives to the same extent they cover the expenses of other types of drugs and preventive care.[17] Although influential (it being the enforcer of Title VII), an EEOC decision is nonetheless without the force of law. The Eighth Circuit effectively disregarded it in *In re Union Pacific Railroad Employment Practices Litigation*, ruling that exclusion of all prescription contraception from coverage under an employee health insurance plan does not constitute gender discrimination against female employees, and thus does not violate Title VII as amended by the PDA,[18] thereby providing justification for health care plans that exclude contraception coverage.[19]

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[14] Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000e (2006)).

[15] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 128–29 (1976).

[16] Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2006)) [hereinafter the PDA].

[17] EEOC Decision on Coverage of Contraception (Dec. 14, 2000), *available at* http://www.eeoc.gov/policy/docs/decision-contraception.html.

[18] *See In re* Union Pac. R.R. Emp't Practices Litig., 479 F.3d 936, 944 (8th Cir. 2007). Subsequent legislative efforts to mandate coverage for contraception prescriptions and procedures failed. *See*, *e.g.*, Equity in Prescription Insurance and Contraceptive Coverage Act of 2007, H.R. 2413, 110th Cong. (1st Sess. 2007); Putting Prevention First Act of 2004, H.R. 4192, 108th Cong. (2d Sess. 2004); Putting Prevention First Act of 2004, S. 2336, 108th Cong. (2d Sess. 2004).

[19] This decision is in contrast to that rendered in *Erickson v. Bartell Drug Co*., 141 F. Supp. 2d 1266, 1272 (W.D. Wash. 2001) ("In light of the fact that prescription contraceptives

B. PPACA and the Mandate

Signed into law on March 23, 2010, the Patient Protection and Affordable Care Act (PPACA) was the signature legislation of the first term of the Obama Administration.[20] Of central importance to this discussion are those provisions of the PPACA that require, subject to certain exceptions,[21] insurance plans that provide prescription drug coverage to include contraception coverage on a no cost-sharing basis, in other words, no deductible or co-pay.[22] Encompassed therein are daily birth control pills, hormonal patches, and hormonal injections.[23] In addition, the coverage must extend to Plan B, ella, and similar drugs that fall within the category of "morning after pills."[24] Last, the plans must provide equal coverage for surgical contraception, such as intra-uterine devices and tubal ligations.[25] Collectively, these requirements constitute the "Mandate." Ergo, while there is no requirement that a health care insurance policy provide a prescription drug benefit, subject to the grandfathering of certain existing plans,[26] if one is provided then contraception prescriptions must be covered on a no-cost sharing basis.

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are used only by women, Bartell's choice to exclude that particular benefit from its generally applicable benefit plan is discriminatory.").

[20] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. §§ 18001–18121 (2012)), as amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152 (March 30, 2010).

[21] Even as the PPACA contains the Mandate, its application must be considered in light of the grandfathering of most insurance policies. Plans existing on March 23, 2010, and from that day maintained in force, including by renewal, are exempt from the requirement to satisfy the Mandate. *See* Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,538, 34,540 (June 17, 2010) [hereinafter Interim Final Rules]. *See also* 26 C.F.R. § 54.9815-2714T(g) (2012) (listing requirements for maintaining grandfathered status). The number of plans that have grandfathered status and the number of beneficiaries thereof who lack the coverage required by the Mandate is open to question. It is entirely possible that some grandfathered plans provided the coverage required by the Mandate.

[22] *See* 42 U.S.C. § 300gg-13(a)(4) (2010). HRSA guidelines, in turn, require coverage, without cost sharing, for, among other things, "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods ... for all women with reproductive capacity." 77 Fed. Reg. 8725 (Feb. 15, 2012).

[23] *See Birth Control: Medicines to Help You*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last visited Jan. 12, 2014).

[24] *Id.*

[25] *Id.*

[26] *See* Interim Final Rules, at 34,545 (stating that plans in which individuals were enrolled on March 23, 2010, are not subject to the preventive services provision).

The PPACA requires that the women's preventive health guidelines proposed by the HHS be evidence-based and comprehensive.[27] In order to promulgate such guidelines, a panel of experts convened by the Institute of Medicine (IOM Committee) was charged to "review the science and make recommendations for what women's preventive health services should be covered."[28] The IOM Committee, acting as the scientific resource for HHS's final coverage rule, focused on diseases and conditions more common in women than in men.[29] Between November 2010 and May 2011, the IOM Committee held various informative meetings and public forums on preventive services for women and gathered extensive information on numerous topics related to health and health care services for women.[30]

The IOM Committee found that contraception and contraceptive counseling were not currently included in the range of preventive services available to women under the PPACA,[31] and recommended that preventive services for women, among other things, "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity"[32] be covered. However, the PPACA required the IOM's recommendations be "supported by the Health Resources and Services Administration" (HRSA) before they could be implemented.[33] After presentation, the HRSA adopted them in large part on August 1, 2011.[34] Consequently, new health plans had

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[27] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1001, § 2713, 124 Stat. 119, 131 (2010).

[28] Press Release, Barbara A. Mikulski U.S. Senator for Md. Media Ctr., Mikulski Applauds Adoption of IOM Guidelines For Women's Preventive Health (Aug. 1, 2011), *available at* http://www.mikulski.senate.gov/media/pressrelease/8-1-2011-1.cfm.

[29] *Id.*

[30] INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 16, 22–23 (2011) [hereinafter IOM REPORT].

[31] *Id.* at 109–10. As support for its recommendation (Recommendation 5.5), the IOM Report found "evidence that contraception and contraceptive counseling are effective at reducing unintended pregnancies.... Numerous health professional associations recommend family planning services as part of preventive care for women. Furthermore, a reduction in unintended pregnancies has been identified as a specific goal in *Healthy People 2010* and *Healthy People 2020*." *Id.* at 109.

[32] *Id.* This is "Recommendation 5.5" in the IOM Report.

[33] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1001, § 2713(a)(4), 124 Stat. 119, 131 (2010).

[34] Press Release, U.S. Dep't of Health & Human Servs., Affordable Care Act Ensures Women Receive Preventive Services at No Additional Cost (Aug. 1, 2011), *available at* http://www.hhs.gov/news/press/2011pres/08/20110801b.html.

to include, inter alia, "FDA-approved contraception methods and contraceptive counseling" without cost sharing for "insurance policies with plan years beginning on or after August 1, 2012."[35]

The Mandate is enforced by financial penalties:[36] employers who do not comply face enforcement actions,[37] a penalty of $100 per day per employee,[38] and an annual tax surcharge of $2,000 per employee.[39]

C. The First Exemption from the Mandate

HHS requested public comments after the publication of the interim final regulations, which included the IOM's recommendations.[40] While many commenters supported the inclusion of contraceptive services for all women with no exemptions, others took the position that requiring group health plans sponsored by religious employers to cover such services "that their faith deems contrary to its religious tenets" would encroach upon religious freedom.[41] In response to those comments, the interim final rules were amended to provide HRSA increased discretion to exempt "religious employers" from the Mandate,[42] and provided a definition thereof:

> [F]or purposes of this policy, a religious employer is one that: (1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under § 6033(a)(1) and § 6033(a)(3)(A)(i) or (iii) of the Code.[43]

HHS again accepted comments and considered alternative definitions through January 20, 2012.[44] On that date, HHS announced the adoption of

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[35] *Id. See also* IOM REPORT, *supra* note 30.

[36] These provisions are distinct from the tax penalty (the annual "shared responsibility payment") through which the Individual Mandate is enforced. *See* 26 U.S.C. § 5000A(b) (2010).

[37] *See* 29 U.S.C. § 1132(a) (2009).

[38] *See* 26 U.S.C. § 4980D(a), (b) (2005).

[39] *See* 26 U.S.C. § 4980H(a) (2010).

[40] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011) [hereinafter Amendment to Interim Final Rules].

[41] *Id.*

[42] *Id.*

[43] *Id.*; 45 C.F.R. § 147.130(a)(1)(iv)(B) (2011).

[44] Press Release, U.S. Dep't of Health and Human Servs., A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html.

the religious employer exemption as it was defined in the Amendment to the Interim Final Rules.[45] In effect, this definition of a "religious employer" exempts only churches and other "houses of worship" from the Mandate.[46] Affiliated religious organizations such as hospitals, schools, universities and social welfare organizations were not thereby exempted by the regulations from the Mandate.

D. The Second Exemption from the Mandate

Contemporaneous with the issuance of the final rules, HHS issued guidelines establishing a temporary enforcement safe harbor under which "non-exempted, non-grandfathered group health plans established or maintained by non-profit organizations" that traditionally did not cover prescription contraceptives for religious reasons were granted an additional year to comply with the rules, meaning until the first plan year beginning on or after August 1, 2013.[47] HHS pronounced its willingness to compromise by maintaining the adopted definition of "religious employer" as required under the exemption, but seeking "to develop alternative ways of providing contraceptive coverage without cost sharing with respect to *non-exempted, non-profit religious* organizations with religious objections to such coverage."[48]

In March 2012, HHS issued an Advance Notice of Proposed Rulemaking (ANPRM) expressing its intention to promulgate the above amendments to the final regulations and invited public comment.[49] Subsequent to the release

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[45] *Id.*

[46] *See Contraceptive Coverage in the Health Care Law: What's New as of August 1, 2012?*, NAT'L WOMEN'S HEALTH CTR. (Feb. 25, 2013), *available at* http://www.nwlc.org/resource/contraceptive-coverage-health-care-law-what%E2%80%99s-new-august-1-2012; *see also* Amendment to Interim Final Rules, at 46623.

[47] Center for Consumer Information and Insurance Oversight (CCIIO) & Centers for Medicare & Medicaid Services (CMS), *Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code*, U.S. DEP'T OF HEALTH & HUM. SERVS. (June 28, 2013), www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-20 13.pdf.

[48] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (emphasis added).

[49] Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012); Press Release, U.S. Dep't of Health & Human Servs., Administration Releases Advance Notice of Proposed Rulemaking on Preventive Services Policy (Mar. 16, 2012), *available at* www.hhs.gov/news/press/2012pres/03/20120316g.html.

of the ANPRM, HHS received over 200,000 comments representing a wide variety of stakeholders.[50] Although some comments specifically addressed preferences for alternative means of accommodating, many focused on the scope of the religious employer exemption.[51]

The U.S. Department of Health and Human Services announced on February 1, 2013, a new "Notice of Proposed Rulemaking" that would appear to accommodate many of the objections raised by non-profit religious institutions like Catholic Charities.[52] The two principal changes to the Mandate broaden the scope of religious activities covered and provide alternative funding of contraceptive coverage for other religiously affiliated institutions.[53]

Regarding which previously non-exempt religious entities will meet the requirements for recognition as "religious employers" and thus qualify for the new proposed accommodation, HHS proposed to amend the definition adopted in the 2012 final rules by deleting the first three prongs[54] and clarifying application of the fourth.[55] Thus:

> [a]n employer that is organized and operates as a non-profit entity and referred to in section 6033(a)(3)(A)(i) or (iii) of the Code would be considered a religious employer for purposes of the religious employer exemption. For this purpose, an organization that is organized and operates as a nonprofit entity is not limited to any particular form of entity under state law, but may include organizations such as trusts and unincorporated associated, as well as nonprofit, not-for-profit, non-stock, public benefit, and similar types of corporations.[56]

This rule, as proposed, clarifies that churches and other houses of worship the current exemption "intended" to cover would not be disqualified solely because they provide charitable social services to or employ people of other faiths.[57] In eliminating the first three elements of the "religious

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[50] *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8459 (proposed Feb. 6, 2013) [hereinafter Proposed Rules].

[51] *Id.*

[52] *See also* Patricia Zapor, *HHS Offers New Contraceptive Insurance Options, Broadening Exemptions*, CATHOLIC NEWS SERVICE (Feb. 1, 2013), http://www.catholicnews.com/data/stories/cns/1300438.htm.

[53] *See* Proposed Rules, at 8456–57.

[54] *Id*. at 8461.

[55] *Id.*

[56] *Id.*

[57] *Id.* ("The Departments agree that the exemption should not exclude group health plans of religious entities that would qualify for the exemption but for the fact that, for example, they provide charitable social services to persons of different religious faiths ... when

employer" definition previously proposed, the necessity of inquiry into an employer's purposes, the religious beliefs of its employees, and the religious beliefs of those it serves, the analytic framework was rendered more objective. Most important for purposes of this review, under this expanded exemption non-profit status is a required element, and, "for this purpose, an organization is not considered to be organized and operated as a non-profit entity if its assets or income accrue to the benefit of private individuals or shareholders."[58]

The second significant change under the HHS-proposed rules would be an accommodation (the "Accommodation") that would "protect eligible organizations from having to contract, arrange, pay, or refer for contraceptive coverage" to which they have a religious objection.[59] The process is essentially as follows: eligible organizations would inform their insurers they qualify for the Accommodation. The insurers would then contact the organizations' employees and explain they would provide them with contraceptive coverage at no cost through a completely separate insurance policy that is in no way connected to the religious employer. The insurers could recoup that cost by paying less than they typically would to participate in the new state health exchanges.[60] For purposes of the Accommodation, an "eligible organization" is an organization that:

> [O]pposes providing coverage for some or all of any contraceptive services required to be covered [on account of religious objections]; (2) is organized and operates as a nonprofit entity; (3) holds itself out as a religious organization; and (4) self-certifies that it meets these criteria in accordance with the provisions of the final regulations.[61]

In addition to eligible organizations with insured and self-insured group health plans, HHS would also propose that an eligible nonprofit religious organization that is "an institution of higher education that arranges for health insurance coverage" could "avail itself of an accommodation comparable to that for an eligible organization that is an employer with an insured

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running a parochial school. Indeed, this was never the Departments' intention in connection with the 2011 amended interim final rules or the 2012 final rules.").

[58] *Id.*

[59] *Id.* at 8459.

[60] *Id.* at 8462–63.

[61] *Id.* at 8462. *See also* Center for Consumer Information & Insurance Oversight, *Women's Preventive Services Coverage and Non-Profit Religious Organizations*, CTRS. FOR MEDICARE & MEDICAID SERVS. (June 28, 2013), http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html.

group health plan."[62] This Accommodation extends to religiously affiliated universities, such as Notre Dame and Catholic University of America, and religious organizations such as the Archdiocese of New York, which were among some forty-three Catholic groups that filed suit claiming that the federal government was forcing them to support contraception and birth control or face steep fines.[63]

HHS's objective is that contraception coverage be provided to employees on a no cost-sharing basis;[64] the Accommodation shifts the financial burden from the employer purchasing the employee group health insurance plan to the plan provider.[65] Specifically, HHS explains in the new proposed rules that health insurance issuers would automatically provide separate, individual market contraceptive coverage at no cost for plan participants, it being asserted that:

> [I]ssuers generally would find that providing such contraceptive coverage is [at least] cost neutral because they would be ... insuring the same set of individuals under both [the group health insurance] policies and [the separate individual contraceptive coverage policies and, as a result,] would experience lower costs from improvements in women's health, healthier timing and spacing of pregnancies, and fewer unplanned pregnancies.[66]

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[62] *Text of New Rules to Address Contraception Controversy*, WASHINGTON WIRE, WALL ST. J. (Feb. 1, 2013, 11:32 AM), http://blogs.wsj.com/washwire/2013/02/01/text-of-new-rules-to-address-contraception-controversy/.

[63] Most of the challenges brought by religious entities were held in abeyance pending the release of the final rules as to the Accommodation. *See* Priests for Life v. Sebelius, No. 12-CV-753 (FB), 2013 WL 1563390, at *2–3 (E.D.N.Y. Apr. 12, 2013); Roman Catholic Archbishop of Washington v. Sebelius, 920 F. Supp. 2d 8 (D.D.C. 2013); Roman Catholic Archdiocese of N.Y. v. Sebelius, 907 F. Supp. 2d 310 (E.D.N.Y. 2012). *See also* Priests for Life v. U.S. Dep't Health & Human Servs., Civil No. 13-1261, 2013 WL 5572730 (D.D.C. Oct. 2, 2013) *and* Roman Catholic Archbishop of Washington v. Sebelius, Civil Action No. 13-14410, 2013 WL 5570185 (D.D.C. Oct. 3, 2013) (both indicating that rulings on the merits would be issued prior to January 1, 2014).

[64] Proposed Rules, *supra* note 50, at 8460 ("The Departments aim to secure the protections under section 2713 of the PHS Act that are designed to enhance coverage of important preventive services for women without cost sharing while accommodating the religious objections to contraceptive coverage of eligible organizations.").

[65] *See* Press Release, Office of the Press Sec'y, Fact Sheet: Women's Preventive Services and Religious Institutions (Feb. 10, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions.

[66] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,877 (July 2, 2013); *see also* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012) ("A 2000 study estimated that it would cost employers 15 to 17 percent more not to provide contraceptive coverage

A proposal to amend the PPACA to include an exemption from the benefits otherwise required under the PPACA, based upon the "religious beliefs or moral convictions of the sponsor, issuer, or other entity offering the plan[,]"[67] the so-called "Blunt Amendment," was voted down on March 1, 2012.[68]

On June 28, 2013, HHS, the Department of Labor, and the Department of the Treasury released final regulations as to (1) the regulatory exemption from the Mandate for churches and (2) the Accommodation for religious organizations that are not churches.[69] The final rules essentially adopt both revised exemptions that the Accommodation proposed. The primary substantive changes are in the regulatory simplification of the Accommodation's implementation. As such, churches, other houses of worship, and certain closely affiliated activities are exempt from the Mandate.[70] Religiously

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in employee health plans than to provide such coverage, after accounting for both the direct medical costs of pregnancy and the indirect costs such as employee absence and reduced productivity.").

[67] 158 CONG. REC. S1079 (daily ed. Feb. 28, 2012).

[68] *See*, N.C. Aizenman & Rosalind S. Helderman, *Birth Control Exemption Bill, The 'Blunt Amendment,' Killed in Senate*, WASH. POST (Mar. 1, 2012), http://www.washingtonpost.com/national/health-science/birth-control-exemption-bill-the-blunt-amendment-killed-in-senate/2012/03/01/gIQA4tXjkR_story.html. Additional pushes to add further "conscience" exemptions were made during the October 2013 budget standoff/government shutdown; none have succeeded as of January 16, 2014. *See*, *e.g.*, Health Care Conscience Rights Act, S. 1204, 113th Cong. (1st Sess. 2013); Health Care Conscience Rights Act, H.R. 940, 113th Cong. (1st Sess. 2013). *See also* Steve Benen, *Contraception Restrictions Remain a Top Republican Priority*, MSNBC (Oct. 15, 2013, 12:20 AM), http://www.msnbc.com/rachel-maddow-show/contraception-still-gop-focus. Similar efforts have been undertaken at the state level, either through legislation or in the courts. *See*, *e.g.*, H.B. 2625, 50th Legislature, 2d Reg. Sess. (Ark. 2013); H.B. 2625, 15th Leg., 2d Reg. Sess. (Az. 2013); H.B. 351, 130th General Assembly, Reg. Sess. (Ohio 2013-14); Mo. Ins. Coalition v. Huff, No. 4:12CV02354 AGF, 2013 WL 2250430 (E.D. Mo. May 22, 2013) (striking down under the Supremacy Clause Missouri statute affording conscience exemption from the Mandate).

[69] *See* Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,873 (July 2, 2013); *see also* Press Release, U.S. Department of Health & Human Servs., Administration Issues Final Rules on Contraception Coverage and Religious Organizations (June 28, 2013), *available at* http://www.hhs.gov/news/press /2013pres/06/20130628a.html.

[70] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,873, 39,892–93 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590). On grounds that will here not be reviewed, the Accommodation was recently held to violate the Free Exercise rights of the plaintiffs. *See, e.g.*, Zubik v. Sebelius, Nos. 13cv1459, 13cv0303 Erie, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013). Other courts considering

sponsored employers such as hospitals and universities are exempt from the Mandate; their employees and the students covered by university-sponsored health care plans will receive contraception coverage by means of the Accommodation.[71]

II. CHALLENGES TO THE MANDATE FROM FOR-PROFIT VENTURES

At no juncture in the development of the regulatory exemptions from the Mandate has it been proposed that for-profit business ventures should be encompassed therein. Still, many such ventures have asserted in various suits that they too deserve exemption from the Mandate.[72]

Hobby Lobby, Autocam and the numerous other business entities have resisted the Mandate on the basis that satisfying its requirements will require them to violate their religious beliefs.[73] Who, however, are "them"? In one

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challenges to the Accommodation have found that it does not violate the Free Exercise rights of religious non-profits. *See, e.g.*, Catholic Diocese of Nashville v. Sebelius, No. 3:13-01303, 2013 WL 6834375 (M.D. Tenn. Dec. 26, 2013).

[71] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 39,893.

[72] Almost all of the owners of these for-profit businesses are Roman Catholic. *See, e.g.*, Monaghan v. Sebelius, 931 F. Supp. 2d 794, 798 (E.D. Mich. 2013); Complaint ¶ 3, SMA, LLC v. Sebelius, No. 0:13-cv-01375 (D. Minn. June 7, 2013); Complaint ¶ 15, Johnson Welded Prods., Inc. v. Sebelius, No. 1:13-cv-00609-ESH (D.D.C. Apr. 30, 2013). There are, however, exceptions. *See*, *e.g.*, Beckwith Electric Co. v. Sebelius, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *1 (M.D. Fla. June 24, 2013) ("Southern Baptist"); Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs., No. 12-3459-CV-S-RED, 2012 WL 6951316, at *2 (W.D. Mo. Dec. 20, 2012) ("Evangelical Christians"); Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 402 (E.D. Pa. 2013) ("Mennonite Christian"); Amended Complaint ¶ 15, Holland v. U.S. Dep't of Health & Human Servs., No. 2:13-cv-15487 (S.D.W. Va. June 26, 2013) ("born-again Christian").

[73] *See, e.g.*, Complaint ¶ 8, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. 5:12-cv-01000-HE) ("The administrative rule at issue in this case ('the Mandate') runs roughshod over the Green family's religious beliefs, and the beliefs of millions of other Americans, by forcing them to provide health insurance coverage for abortion-inducing drugs and devices, as well as related education and counseling."); Complaint ¶ 26, Korte v. U.S. Dep't of Health & Human Servs., 912 F. Supp. 2d 735 (S.D. Ill. Oct. 9, 2012) (No. 3:12-cv-01072-MJR-PMF) ("Plaintiffs Cyril B. Korte and Jane E. Korte believe that they cannot arrange for, pay for, provide, facilitate, or otherwise support employee health plan coverage for contraceptives, sterilization, abortion, or related education and counseling without violating their religious beliefs ...."); *id.* ¶ 31 ("Under the terms of the Mandate, Plaintiffs will not be permitted to obtain coverage that excludes the aforementioned drugs and services. On the contrary, the Mandate will require that Plaintiffs continue to provide their employees with coverage of those services, activities, and practices that Plaintiffs consider sinful and immoral."); Complaint ¶¶ 17, 25, Infrastructure Alternatives, Inc. v. Sebelius, No. 1:13-cv-00031-RJJ (W.D. Mich. Jan. 10, 2013)

alternative, the business entity takes on the religious beliefs of its owners and management, asserting, inter alia, that complying with the Mandate would violate the entities' religious beliefs.[74] In the second alternative, the activities

("Plaintiffs Cretens and Trierweiler [who own eighty-seven percent of the corporation plaintiff] are adherents of the Catholic faith as defined by the Magisterium, the teaching authority of the Catholic Church, which prohibits Plaintiffs from participating in, paying for, facilitating, training others to engage in, or otherwise cooperating with the practice of contraception and sterilization, particularly abortifacients.").

[74] Although this discussion is framed in terms of the Mandate and its requirement of coverage for contraception, the analytic protocol as to whether the Mandate violates Free Exercise rights is not restricted to the Mandate. The same analysis would apply to other religiously based objections to other aspects of required provisions of health insurance plans.

The United States encompasses a nearly unbelievably diverse mix of religious faiths. *See* Salazar v. Buono, 559 U.S. 700, 723 (2010) (Alito, J., concurring) (describing the United States as "a Nation of unparalleled pluralism and religious tolerance."). Those various faiths have any number of specific beliefs, requirements, and limitations. It is unnecessary to go to the extreme of questioning whether there is a Free Exercise violation in generally applicable rules against murder as applied to faiths involving human sacrifice. *See, e.g.*, JULIUS CAESAR, CAESAR'S COMMENTARIES ON THE GALLIC WAR 202–03 (Lee & Shepard 1904) (Druids). However, it is appropriate to consider whether religious belief-based requirements may be cited in seeking additional exemptions from the minimum benefit requirements of the PPACA. Based upon the Free Exercise rights of the shareholders, may a corporation owned by those of the Scientology faith insist that any health insurance policy not cover psychiatric treatments? *See, e.g.*, Katharine Mieszkowski, *Scientology's War on Psychiatry*, SALON (July 1, 2005, 6:37 PM), http://www.salon.com/2005/07/01/sci_psy/. May a corporation owned by those of the Christian Scientist faith insist that no insurance be required? May a corporation owned by a fundamentalist snake handler insist any policy exclude coverage for snake bites suffered in a religious ceremony because the shareholder believes the snake bite evidences God's displeasure with the person bitten and that there should be no medical intervention against that displeasure? May a corporation owned by a Mormon family insist any company-sponsored insurance policy exclude coverage for illnesses that arise from smoking or consuming alcohol? May the corporation owned by Jehovah's Witnesses insist the employee health insurance policy not cover blood transfusions? *See, e.g.*, *Why Don't You Accept Blood Transfusions?*, JW.ORG, http://www.jw.org/en/jehovahs-witnesses/faq/jehovahs-witnesses-why-no-blood-transfusions/ (last visited Jan. 12, 2014). Based on the religious belief that extra-marital sexual relations are sinful, may the shareholders of a corporate employer insist the health insurance policy not provide benefits for delivery of a child conceived out of wedlock? Believing that pre-marital relations are sinful and that the vaccine against the human papilloma virus encourages pre-marital relations, may the shareholders of a corporation insist the plan it sponsors not cover the cost of this vaccination? *See*, *e.g.*, Sara E. Abiola et al., *The Politics of HPV Vaccination Policy Formation in the United States*, 38 J. HEALTH POL. POL'Y & L. 645, 656, 665 (2013); Robert Taylor, *Religious Conservatives and Safe Sex*, APSA 2012 Annual Meeting Paper 4 (2012), *available at* http://ssrn.com/abstract=2105100. The scope of the Mandate is only a small subset of the class of medical procedures to which a Free Exercise objection could be raised. Senator Barbara Boxer set forth a similar litany of exemptions in argument against The Blunt Amendment. *See* 158 CONG. REC. S1080 (daily ed. Feb. 28, 2012). *See also* Korte v. Sebelius, 735 F.3d 654, 687–91 (7th Cir. 2013) (Rovner, J., dissenting).

of the business entity are treated as those of the owners; in effect, they assert that the entity acts as the nominee through which they undertake both business activities and religious expression.[75] In the third alternative, the business entity acts to protect the Free Exercise rights of its owners.[76]

Irrespective of the theory upon which Hobby Lobby and other for-profit ventures attempt to proceed, these assertions are untenable as a matter of the law of business organizations.

III. BUSINESS ENTITY LAW AND SEPARATE LEGAL PERSONHOOD

A corporation is a legal construct that is the product of positive law. In *Trustees of Dartmouth College v. Woodward*,[77] the Supreme Court famously observed that "[a] corporation is an artificial body, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[78]

A fundamental purpose of the corporation is to act as a mechanism in which title to property may be vested which is not altered or diminished by alterations in the corporation's ownership. Ergo, the corporation may exist in perpetuity even though individual shareholders, at least those who are natural persons, will inevitably die. Hence, it is said that a corporation enjoys "perpetual succession."[79] As set forth by one commentator:

> The ordinary incidents to a corporation are, 1. To have perpetual succession, and, of course, the power of electing members in the room of

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[75] *See*, *e.g.*, *Korte*, 735 F.3d at 688 (7th Cir. 2013) (Rovner, J., dissenting) ("[T]he court equates the business activities of these secular, for-profit firms with the religious exercise of it owners."); Complaint ¶ 33, Autocam Corp. v. Sebelius, 2012 WL 6845677 (W.D. Mich. 2012) (No. 1:12-cv-01096).

[76] *See infra* notes 165–184.

[77] 17 U.S. (4 Wheat.) 518 (1819).

[78] *Id.* at 636.

[79] *Id.* at 636:

> Among the most important [characteristics of a corporation] are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use.

> those removed by death or otherwise; 2. To sue and be sued and to grant and to receive by their corporate name; 3. To purchase and hold land and chattels; 4. To have a common seal; 5. To make by-laws for the government of the corporation; 6. The power of *amotion*, or removal of members. Some of these power are to be taken, in many instances, with much modification and restriction; and the essence of the corporation ... consists only of a capacity to have perpetual succession, under a special denomination, and an artificial form, and to take and grant property, contract obligations, and sue and be sued, by its corporate name, and to receive and enjoy, in common, grants of privileges and immunities.[80]

Returning to *Dartmouth College*, the Supreme Court wrote:

> It is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage. Hence, such a corporation may sue and be sued by its own members, and may contract with them in the same manner, as with any strangers.[81]

There exists a real distinction between the corporation and its shareholders. The shareholders do not "do business as" the corporation, but rather, the corporation does business as a distinct legal being.[82] The Supreme Court has observed: "Incorporation's basic purpose is to create a distinct legal entity with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs."[83]

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[80] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 308–09 (7th ed. 1851).

[81] *Dartmouth College*, 17 U.S. at 667–68.

[82] *See*, *e.g.*, IND. CODE ANN. § 23-1-22-2 (West 2013) (["E]very corporation ... has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs ...."); KY. REV. STAT. ANN. § 271B.3-020(1) (West 2013) ("[E]very corporation shall have ... the same powers as an individual to do all things necessary or convenient to carry out its business and affairs ...."). *See also* Gilardi v. Sebelius, 926 F. Supp. 2d 273, 278 (D.D.C. 2013):

> As an initial matter, the Court is troubled by plaintiffs' apparent disregard of the corporate form in this case. Plaintiffs argue that "requiring the two corporations to provide group health coverage that the Gilardis consider immoral is the same as requiring the Gilardis themselves to provide such immoral coverage." The Court strongly disagrees. The Gilardis have chosen to conduct their business through corporations, with their accompanying rights and benefits and limited liability. They cannot simply disregard that same corporate status when it is advantageous to do so.

(Citation omitted).

[83] Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001). *See also* CHARLES B. ELLIOTT, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 8 (5th ed. 1923) ("The

The law of business organizations is replete with examples of the separateness of the organization from its owners. Initially, shareholders are not, qua shareholders, liable for the debts and obligations of the corporation.[84] The management and affairs of the corporation are vested not in the shareholders but rather in the board of directors.[85] The property of the corporation

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idea of separate personality, (or, in unfigurative language, as a special association which the law deals with in some respects as if constituting a separate personality), is at the base of the corporation concept. The sharp line of demarcation between the collective person and the separate members, expressed the fundamental idea underlying the Roman law of corporations.... But the English common law fully recognized the separate personality of the corporate entity. It inherited this principle from the Roman law and adorned it with such metaphysical concepts as 'invisibility,' 'intangibility,' 'immortality,' and 'soullessness.'" (citations omitted)).

[84] *E.g.*, DEL. CODE ANN. tit. 8, § 141(a) (West 2013); IND. CODE ANN. § 23-1-26-3(b) (West 2013); KY. REV. STAT. ANN. § 271B.6-220(1) (West 2013); MODEL BUS. CORP. ACT § 6.22(a) (2010). The same rule applies in the context of an LLC, its members enjoying limited liability from its debts and obligations. *See* DEL. CODE ANN. tit. 6, § 18-303(a) (West 2013); IND. CODE ANN. § 23-18-3-3(a) (West 2013); KY. REV. STAT. ANN. § 275.150(1) (West 2013); ABA Comm. on LLCs, Partnerships and Unincorporated Entities, REVISED PROTOTYPE LIMITED LIABILITY COMPANY ACT § 304 (2011), http://www.americanbar.org/content/dam/aba/administrative/business_law/201105_business_law_llcs_rpllca_may_2011.authcheckdam.pdf; *see also* 1 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 14 (2006) (arguing that a corporation may be properly organized for the avowed purpose of maintaining it as a separate entity free from shareholder responsibility for the corporation's debts); BAYLESS MANNING, A CONCISE TEXTBOOK ON LEGAL CAPITAL 6 (2d ed. 1977); MAURICE WORMSER, DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS 13–14 (Baker, Voorhis & Co. eds., 1927) ("The debts of the corporation are its debts, and only its. They are not the individual stockholder's debts....").

[85] *See*, *e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (West 2013); IND. CODE ANN. § 23-1-33-1(b) (West 2013); KY. REV. STAT. ANN. § 271B.8-010(2) (West 2013); Allied Ready Mix Co. v. Allen, 994 S.W. 2d 4, 8 (Ky. Ct. App. 1998) ("Directors rather than shareholders manage the business and affairs of a corporation."); MOD. BUS. CORP. ACT § 8.01(b) (2010); 1 JAMES D. COX & THOMAS LEE HAZEN, COX & HAZEN ON CORPORATIONS 410 (2d ed. 2003) ("A corporation's board of directors is legally the supreme authority in matters of the corporation's regular business management."); CHARLES B. ELLIOTT, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS 558 (5th ed. 1923). A shareholder's direct rights vis-à-vis control of the corporation are restricted to the periodic election of directors and, after board approval, passing upon organic transactions such as merger, sale of substantially all assets outside the ordinary course of business, and amendment of the articles of incorporation. *See, e.g.*, DEL. CODE ANN. tit. 8, § 211(b) (West 2013) (election of directors); IND. CODE ANN. § 23-1-33-3(c) (West 2013) (election of directors); KY. REV. STAT. ANN. § 271B.8-030(4) (West 2013) (election of directors); DEL. CODE ANN. tit. 8, § 251(b) (West 2013) (mergers); IND. CODE ANN. § 23-1-40-3(b) (West 2013) (mergers); KY. REV. STAT. ANN. § 271B.11-030(2) (West 2013) (mergers); DEL. CODE ANN. tit. 8, § 271(a) (West 2013) (sale of assets); IND. CODE ANN. § 23-1-41-2(b) (West 2013) (sale of assets); KY. REV. STAT.

is that of the corporation as a legal entity distinct from the shareholders, and those assets are not available to satisfy the personal debts of the shareholders.[86] An individual shareholder is not, as a shareholder, an agent of the corporation,[87] and neither is the entire body of shareholders.[88] A natural

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ANN. § 271B.12-020(2) (West 2013) (sale of assets); DEL. CODE ANN. tit. 8, § 242(b) (West 2013) (amending governing articles); IND. CODE § 23-1-38-3(b) (West 2013) (amending governing articles); KY. REV. STAT. ANN. § 271B.10-030(2) (West 2013) (amending governing articles); MOD. BUS. CORP. ACT § 8.03(c) (2010) (election of directors); MOD. BUS. CORP. ACT § 11.04(b) (2010) (merger); MOD. BUS. CORP. ACT § 12.02(b) (2010) (sale of assets); MOD. BUS. CORP. ACT § 10.03(b) (2010) (amendment of articles).

[86] *E.g.*, KY. REV. STAT. ANN. § 271B.3-020(1) (West 2013) ("[E]very corporation shall have perpetual duration and succession in its corporate name and shall have the same powers as an individual to ... (d) Purchase, receive, lease, or otherwise acquire, and own, hold, improve, use and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located …."); Ark. Iron & Metal Co. v. First Nat'l Bank of Rogers, 701 S.W.2d 380, 384 (Ark. App. 1985) ("'A stockholder does not acquire any estate in the property of a corporation by virtue of his stock; the full legal and equitable title thereto is in the corporation....'") (quoting Red Bud Realty Co. v. South, 131 S.W. 340, 344 (Ark. 1910)) (alteration in original)); *In re* Peoples Bankshares, Ltd., 68 B.R. 536, 539 (Bankr. N.D. Iowa 1986) ("Although a debtor owns 100 percent of the stock of a corporation, the property interest of the debtor's bankruptcy estate extends only to the intangible personal property rights represented by the stock certificates; the technical, legal distinctions between corporations will be respected and applied with reference to the automatic stays of actions against property of the estate."); 18A AM. JUR. 2D *Corporations* § 630 (2004) ("A stockholder has no right to interfere with the possessory interest of the corporation in its assets or property" because the corporation, not the shareholders, owns the property of the corporation.); WILLIAM L. CLARK, JR., HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS 36 (2d ed. 1907). *See also* KY. REV. STAT. ANN. § 275.240(1) (West 2013) (providing that the property of LLC to be that of the LLC and not of the members); S.D. CODIFIED LAWS § 47-34A-501(a) (2013) ("A member is not a co-owner of, and has no transferable interest in, property of a [LLC]."); VA. CODE § 13.1-1021 (West 2013) (providing that an LLC takes title to its property).

[87] *See, e.g.*, 2 WILLIAM W. COOK, A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK § 709 (5th ed. 1903) ("The stockholders cannot enter into contracts with third persons. Contracts between the corporation and third persons must be entered into by the directors and not by the stockholders. The corporation, in such matters, is represented by the former and not by the latter. Such is one of the main objects of corporate existence. To the directors are given the management and formation of corporate contracts. The stockholders cannot, in meeting assembled, bind the corporation by their contracts in its behalf."); WILLIAM W. COOK, A TREATISE ON STOCK AND STOCKHOLDERS AND GENERAL CORPORATION LAW 8 (2d ed. 1889) ("The mere fact that he is a stockholder does not make him an agent to contract for it or bind it by his acts."); FLETCHER, *supra* note 84, § 30 ("The mere fact that one is a shareholder or a majority or principal shareholder gives the individual no authority to represent the corporation as its agent in dealing with third persons.").

[88] *See* 18A AM. JUR. 2D *Corporations* § 630 (2013).

person is permitted to represent himself in court without a requirement to retain legal counsel, but a corporation may appear only through legal counsel; it may not be represented by a shareholder—even the sole shareholder.[89] A shareholder—even a sole shareholder—may not seek personal redress for an injury suffered by the corporation.[90] A shareholder—even a sole shareholder—is not a party to the corporation's contracts.[91]

Consider a business corporation in which a single individual is its sole shareholder, sole director, and sole officer. It is deceptively easy to think that there is an entire unity of interests between that single, natural person comprising all three roles and the corporation. Doing so, however, fails to account for (1) the distinct legal rights of the corporation as a legal person and (2) the distinctions among the roles of shareholder, director, and officer. The property of the corporation is that of the corporation; it is not the property of the shareholder and it is not co-owned by the shareholder.[92] The individual

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[89] *See*, *e.g.*, Osborn v. Bank of the U.S., 22 U.S. 738, 830 (1824) ("A corporation, it is true, can appear only by attorney, while a natural person may appear for himself."); United States v. Hagerman, 545 F.3d 579, 581–82 (7th Cir. 2008) ("[T]he right to conduct business in a form that confers privileges, such as the limited personal liability of the owners for tort or contract claims against the business, carries with it obligations one of which is to hire a lawyer if you want to sue or defend on behalf of the entity."); THE LAW OF CORPORATIONS 6 (London, Richard & Edward Atkins, 1702) ("They cannot appear in person, but by Attorny [sic]."). The same rule applies with respect to LLCs. *See*, *e.g.*, Lattanzio v. COMTA, 481 F.3d 137 (2d Cir. 2007) (holding that a LLC could appear in federal court only through a licensed attorney); *In re* Shattuck, 411 B.R. 378 (B.A.P. 10th Cir. 2009) (holding that an individual must be a licensed attorney to appear on behalf of an LLC in bankruptcy court).

[90] *See*, *e.g.*, Kagan v. Edison Bros. Stores, Inc., 907 F.2d 690, 693 (7th Cir. 1990) ("Investors who created the corporate form cannot rend the veil they wove."); Canderm Pharmacal, Ltd. v. Elder Pharm., Inc., 862 F.2d 597, 603 (6th Cir. 1988) (holding that an action to redress injuries to a corporation cannot be maintained by a stockholder in his or her own name, even where the individual is the sole stockholder). *See also* Turner v. Andrew, 413 S.W.3d 272, 276 (Ky. 2013) (holding that sole member of LLC may not individually pursue a claim for lost business profits; "[A]n LLC is not a legal coat that one slips on to protect the owner from liability but then discards or ignores altogether when it is time to pursue a damage claim.").

[91] *See*, *e.g.*, Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 587 (1839); Kush v. Am. States Ins. Co., 853 F.2d 1380, 1384 (7th Cir. 1988) (rejecting an effort by a sole shareholder to enforce an insurance contract entered into by the corporation, "Kush may not move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms.").

[92] *See*, *e.g.*, Domino's Pizza, Inc. v. McDonald, 546 U.S. 470 (2006) (holding that a corporation's shareholders and contracting officers have no rights under the corporation's

will be a director of the corporation if and only if elected to the board of directors; there is no default rule to the effect that a shareholder, even a sole-shareholder, will be deemed elected a director. The same individual will be an officer of the corporation if and only if appointed an officer by the board of directors.[93] No director or shareholder is by virtue of either position an officer of the corporation. As a shareholder the individual may selfishly look out for his own interests[94] while as a director he or she must look out for the best interests of the corporation.[95] As an officer he or she is obligated to look out for the best interests of the corporation while discharging the duties imposed by the board of directors.[96] The individual, whether a shareholder, director, or officer, is not a party to the corporation's obligations, and likewise the natural person is not liable for the corporation's debts and obligations.[97] There is at law no unity of interests because there are both the corporate person and the natural person, each with distinct roles and rights.

These principles found expression in *Domino's Pizza, Inc. v. McDonald*.[98] McDonald, the sole shareholder of a corporation, sought to bring claims under United States Code § 1981 for the refusal by Domino's Pizza to do business with JMW, his corporation.[99] The corporation itself brought no § 1981 claim:

> McDonald argues that the statute must be read to give him a cause of action because he "made and enforced contracts" for JWM. On his reading of the text, "[i]f Domino's refused to deal with the salesman for a pepperoni manufacturer because the salesman was black, that would violate the section 1981 right of the salesman to make a contract on behalf of his principal." We think not.[100]

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contracts); Harton v. Johnston, 51 So. 992, 993 (Ala. 1910) (holding that shareholders are not tenants-in-common of the corporate assets).

[93] *See*, *e.g.*, KY. REV. STAT. ANN. § 271B.8-400(1) (West 2013) ("A corporation shall have the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws.").

[94] *See*, *e.g.*, Haldeman v. Haldeman, 197 S.W. 376, 381 (Ky. App. 1917) ("A stockholder occupies a position and owes a duty radically different from a director. A stockholder may in a stockholders' meeting vote with the view of his own benefit; he represents himself only.").

[95] *See*, *e.g.*, IND. CODE ANN. § 23-1-35-1(a)(3) (West 2013); KY. REV. STAT. ANN. § 271B.8-300(1) (West 2013); MOD. BUS. CORP. ACT § 8.30(a) (2010).

[96] *See*, *e.g.*, KY. REV. STAT. ANN. § 271B.8-420(1)(c) (West 2013); MOD. BUS. CORP. ACT § 8.42(a)(3) (2010).

[97] *See supra* notes 84, 91.

[98] 546 U.S. 470 (2006).

[99] *Id.* at 472–73. *See also* 42 U.S.C. § 1983 (2006).

[100] 546 U.S. at 475 (citation omitted).

The Court went on to explain that the right to make a contract belongs to the principal, and that the principal's agent is not aggrieved when the contract is not made or when it is breached.

> But it is fundamental corporation and agency law—indeed it can be said it be the whole purpose of corporation and agency law—that the shareholders and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts.[101]

The *Beckwith Electric Co. v. Sebelius* decision misinterpreted the effect of incorporation, incorrectly deriving from those decisions that had focused on the distinction between the shareholders and corporate activity that, "[t]his principled demarcation of obligations and benefits seems to hinge in part on the benefit of limited liability gained by the individual in exchange for the relinquishment of the right to exercise religion."[102] The point is not that "individuals bartered for the privilege of limited personal liability in exchange for the relinquishment of their free exercise rights when engaging in commerce under the corporate form."[103] Rather, the point is that natural persons elected for any of a variety of reasons to with state involvement create a distinct jural person who would carry on business from which those natural persons would have a claim on the residual gain it might realize from its activities.[104] A shareholder does not assume a "corporate identity";[105] instead, the corporation and the shareholder each have distinct identities.

The corporation and its shareholders are legally distinct from one another, and the rights and responsibilities of one are not the rights and responsibilities of the other. Further, there is extreme attenuation between

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[101] *Id*. at 477; *see also* Painter's Mill Grille, LLC v. Brown, 716 F.3d 342 (4th Cir. 2013) (member of LLC lacked standing to present §§ 1981, 1982, and 1985(3) claims for alleged injuries to the LLC); Potthoff v. Morin, 245 F.3d 710 (8th Cir. 2001) (holding that the sole shareholder lacked standing to individually bring a claim for § 1983 violation alleged to be suffered by corporation).

[102] Beckwith Electric Co. v. Sebelius, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *9 (M.D. Fla. June 25, 2013).

[103] *Id*. at *10.

[104] *See*, *e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH 38–41 (2012) (positing that a shareholder holds only a limited series of contractual rights vis-à-vis the corporation, primarily a contingent claim to a pro-rata portion to the residual gains of the venture, and that the shareholders are not title owners of the juridic person).

[105] *Beckwith*, 2013 WL 3297498, at *11 (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010) ("[T]he Government may not suppress political speech on the basis of speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.")).

the shareholders and the actions of the corporation occasioned by the intervention of the board's role in determining policy, the officer's role in the implementation of that policy, and the satisfaction of the debt created out of assets belonging to the corporation.

IV. A BUSINESS ENTITY HAS NO FREE EXERCISE RIGHTS AND SHAREHOLDERS DO NOT DO BUSINESS THROUGH A CORPORATION

Irrespective of the theory upon which they may proceed, neither a for-profit business entity[106] nor its owners may claim exemption from the Mandate based on the Free Exercise Clause.

A. A Corporation Has Neither a Religion Nor Free Exercise Rights

The maintenance of religious beliefs and conduct arising therefrom are a necessary precondition to the benefit of protections under the Free Exercise Clause.[107] Because a corporation itself has no religion, it has no Free Exercise protections.

For certain purposes, a corporation is treated as a "person" benefiting from constitutional protections, but those protections are afforded on a case-by-case basis.[108] For example, a corporation may be a "person" with a defined citizenship who may access the federal courts by means of diversity jurisdiction.[109] It benefits from due process[110] and equal protection of the law,[111] may exercise the rights of a free press,[112] and enjoys protections against unreasonable search and seizure of its property.[113] Conversely, a corporation has no Fifth Amendment right against self-incrimination[114] and its

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[106] This statement should not be read as a concession that a non-profit corporation is able to exercise Free Exercise rights. *See supra* note 8.

[107] *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[108] *See* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1287 (W.D. Okla. 2012) ("Corporations have constitutional rights in some circumstances, such as the right to free speech, but the rights of corporate persons and natural persons are not coextensive.").

[109] *E.g.*, Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61 (1809).

[110] Minneapolis & St. Louis Ry. v. Beckwith, 129 U.S. 26, 28 (1889) ("It is contended by counsel as the basis of his argument, and we admit the soundness of his position, that corporations are persons within the meaning of the [14th Amendment, § 1].").

[111] *See* Santa Clara Cnty. v. S. Pac. R.R., 118 U.S. 394, 396 (1886).

[112] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 286–88 (1964); Grosjean v. Am. Press Co., 297 U.S. 233, 244 (1936).

[113] *See* Hale v. Henkel, 201 U.S. 43, 76 (1906).

[114] United States v. White, 322 U.S. 694, 698 (1944); *see also* Strategic Def. Int'l, Inc. v. United States, 745 F. Supp. 2d 1214, 1234–35 (M.D. Fla. 2010) (holding that a corporation has no right to testify on its own behalf).

due process rights are restricted as compared to those of natural persons.[115] A First Amendment right to petition the government exists[116] and a corporate expenditure with respect to an election may not be restricted on the basis of its corporate form,[117] but political contributions by that same corporation may be restricted.[118] A corporation has no right to vote, hold elected office, or sit on a jury.[119] A corporation is not a person for determining the allocation of seats among the states in the House of Representatives.[120] An indigent corporation is not entitled to state-appointed legal counsel.[121]

It is axiomatic that the Free Exercise Clause protects religious beliefs and conduct based thereon; absent religious belief the Free Exercise Clause is without application.[122] Although a number of courts have recently avoided

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[115] Nw. Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 252, 255 (1906).

[116] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789–92 (1978).

[117] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010); *see also* Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 533 (1980).

[118] *Citizens United*, 558 U.S. at 314–15.

[119] The author admits his inability to find authority for this proposition, likely because nobody has argued a corporation has these rights. *See also Citizens United*, 558 U.S. at 394 (Steven, J., dissenting) ("In the context of election to public office, the distinction between corporate and human speakers is significant. Although they made enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office.").

[120] Although section 2 of the 14th Amendment provides that Representatives shall be allocated among the states "counting the whole number of persons in each State," it appears that no court has been called upon to address the question of whether a "person" includes a "corporation" for these purposes. U.S. CONST. amend. XIV, § 2.

[121] *See* United States v. Chaudary, No. 12-20123-CM, 2012 WL 5877414, at *2 (D. Kan. Oct. 30, 2012); United States v. Golden Heart In Home Care LLC, No. 2:12-cr-00062, 2012 WL 3580194, at *3 (S.D. W. Va. Aug. 17, 2012); United States v. Johnson, No. CRIM. A. 98-276, 1999 WL 569528, at *3 (E.D. La. Aug. 3, 1999). In addition, a corporation is not a "person" for purposes of the car pool lane. Mark Gibbs, *Are Corporations People in the Carpool Lane?*, FORBES (Jan. 7, 2013, 11:35 PM), http://www.forbes.com/sites/markgibbs/2013/01/07/are-corporations-people-in-the-carpool-lane/. A corporation cannot be licensed to practice a profession. *See*, *e.g.*, State Farm Mut. Auto. Ins. Co. v. Newburg Chiropractic, P.S.C., 683 F. Supp. 2d 502, 510 (W.D. Ky. 2010) (citing 1 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7.05 (Perm. ed. 1999)). *See also* FCC v. AT&T, 131 S. Ct. 1177, 1178 (2011) (corporate information is not subject to the personal privacy exemption of § 7(C) of the Freedom of Information Act).

[122] *See*, *e.g.*, Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 833 (1989) ("There is no doubt that '[o]nly beliefs rooted in religion are protected by the Free Exercise Clause.' Purely secular views do not suffice.") (citations omitted); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("[T]o have the protection of the Religion Clauses, the claims must be

the question of whether the Free Exercise Clause is applicable to corporations and other business entities,[123] a substantial number of courts have held that corporations and other business entities lack Free Exercise protections. For example, in *Atlantic Department Store, Inc. v. State's Attorney for Prince George's County*,[124] the court responded to the assertion that a Sunday closing law infringed upon a corporation's Free Exercise rights, observing that, "[a]s artificial, not natural, persons [corporations] have neither religion nor non-religion, in the free exercise of which the First Amendment protects individuals."[125] In *Blanding v. Sports & Health Club, Inc.*,[126] the Court noted that "[t]he history of the free-exercise clause indicates that it is a purely personal guarantee,"[127] and in considering whether a business corporation has Free Exercise rights the Court wrote:

> Certain "purely personal" guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the "historic function" of the particular guarantee has

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rooted in religious belief."); *id.* at 216 (holding that choices that are "philosophical and personal rather than religious" are not within the scope of the Religion Clauses); Snyder v. Murray City Corp., 124 F.3d 1349, 1352 (10th Cir. 1997) (citing United States v. Seeger, 380 U.S. 163, 185 (1965)) ("The first questions in any free exercise claim are whether the plaintiff's beliefs are religious in nature, and whether those religious beliefs are sincerely held."); *id.* ("Only beliefs which are religious in nature are protected by the Free Exercise Clause."); Ochs v. Thalacker, 90 F.3d 293, 296 (8th Cir. 1996); Fiedler v. Marumsco Christian Sch., 631 F.2d 1144, 1151 (4th Cir. 1980).

[123] *See*, *e.g.*, Grote Indus., LLC v. Sebelius, 914 F. Supp. 2d 943, 949 (S.D. Ind. 2012) (declining to address the availability of Free Exercise rights in Grote Industries by finding an absence of "substantial burden" on those rights were they to exist); O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1158 (E.D. Mo. 2012) (raising but declining "to reach the question of whether a secular limited liability company is capable of exercising a religion within the meaning of RFRA or the First Amendment"); Newland v. Sebelius, 881 F. Supp. 2d 1287, 1295 (D. Colo. 2012) (referring to the question of a corporation's Free Exercise rights as one of first impression).

[124] 323 A.2d 617 (Md. Ct. Spec. App. 1974).

[125] *Id.* at 622. It bears recognizing that the Supreme Court's decision in *Braunfeld v. Brown*, 366 U.S. 599 (1961), holding that a Sunday closing law did not violate the Free Exercise rights of orthodox Jews who closed their retail stores on Saturday, did not require the court to consider an assertion of corporate rights. Rather, as made clear by the caption and style of the trial court ruling, the plaintiffs were individuals and not corporations. *See* Braunfeld v. Gibbons, 184 F. Supp. 352 (E.D. Pa. 1959).

[126] 373 N.W.2d 784 (Minn. App. 1985).

[127] *Id.* at 789 n.1.

> been limited to the protection of individuals. Whether or not a particular guarantee is "purely personal" or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.[128]

In *School District of Abington Township v. Schempp*,[129] the Supreme Court described the purpose of the Free Exercise Clause as "to secure religious liberty *in the individual* by prohibiting any invasions thereof by civil authority."[130]

Numerous courts addressing Mandate challenges have correctly followed this line of cases in holding that corporations have no Free Exercise rights.[131]

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[128] *Id.* (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n.14 (1978); *see also* Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U. L. REV. 1469, 1476 n.35 (2012) ("It is also odd to discuss the religious conscience of an organization.... People have consciences; they can feel indignity, shame, or remorse. Institutions do not."); Caroline Mala Corbin, *Debate, The Contraception Mandate and Religious Freedom, Rebuttal*, 161 U. PA. L. REV. ONLINE 261, 269 (2013), http://www.pennlawreview.com/online/161-U-Pa-L-Rev-Online-261.pdf ("When an individual says, this act burdens my Catholic conscience, we clearly know whose conscience is at issue. But when an institution says, this act burdens our Catholic conscience, that clarity is lacking. Is it the institution's conscience? If so, do institutions even have a conscience in the way that real people do?").

[129] 374 U.S. 203 (1963).

[130] *Id.* at 223 (emphasis added); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 466 (2010) (Stevens, J., dissenting) ("[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires."). Religion, Madison observed, "is a duty which we owe to our CREATOR." *See* JAMES MADISON, THE PAPERS OF JAMES MADISON DIGITAL EDITION, 175 (J. C. A. Stagg, ed. Univ. of Va. Press, Rotunda) (2010), *available at* http://rotunda.upress.virginia.edu/founders/JSMN-01-01-02-0054-0004 (last visited Jan. 12, 2014). Corporations are created by state and occasionally the federal governments.

[131] *See*, *e.g.*, Korte v. Sebelius, 735 F.3d 654, 701 (7th Cir. 2013) (Rovner, J., dissenting) ("A corporation is a legal construct which does not have the sentence and conscience to entertain such ultimate questions."); Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 409 (E.D. Pa. 2013), *aff'd sub nom.* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (U.S. 2013); Mersino Mgmt. Co. v. Sebelius, No. 13-cv-11296, 2013 WL 3546702, at *9 (E.D. Mich. July 11, 2013); Autocam Corp. v. Sebelius, No. 1:12-CV-1096, 2012 WL 6845677, at *4 (W.D. Mich. Dec. 24, 2012); Order Denying Motion for Preliminary Injunction, MK Chambers Co. v. U.S. Dep't of Health & Human Servs., No. 13-11379, 2013 WL 5182435, at *6 (E.D. Mich. Sept. 13, 2013) ("Religious belief takes shape within the minds and hearts of individuals, and its protection is one of the more uniquely human rights provided by the Constitution."); Eden Foods, Inc. v. Sebelius, 733 F.3d 626, 632 (6th Cir. 2013) (following *Autocam* and holding that a corporation has neither Free Exercise nor RFRA rights); Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1214

Free Exercise falls within the group of constitutional rights not afforded to corporations, not out of prejudice against corporations, but rather in recognition that the right would protect a null set. Being only creatures of positive law with defined and limited powers, corporations lack a spiritual element;[132] as it has been observed numerous times, "a corporation has no soul."[133]

(D.D.C. 2013) (noting while religious corporations may have Free Exercise rights, non-religious corporations, which Freshway conceded itself to be, have no such rights.).

[132] *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n.14 (1978) ("Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision."). To date the Supreme Court has never squarely addressed whether a corporation itself exercises religious rights protected by the Free Exercise Clause. *See* Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (2012) (Sotomayor, J.) ("This Court has not previously addressed similar [religious freedom] or free exercise claims brought by closely held for-profit corporations and their controlling shareholders alleging that the mandatory provision of certain employee benefits substantially burdens their exercise of religion."). Curiously, despite this statement, the Tenth Circuit subsequently ruled in *Hobby Lobby*:

> In addition, the Supreme Court has affirmed the RFRA rights of corporate claimants, notwithstanding the claimants' decision to use the corporate form. *See O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft,* 389 F.3d 973, 973 (10th Cir. 2004) (en banc) (affirming a RFRA claim brought by "a New Mexico corporation on its own behalf"), *aff'd,* 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006).

Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1129 (10th Cir.), *cert. granted*, 134 S. Ct. 678 (2013). It is at best difficult to reconcile this statement with that of Justice Sotomayor. At its first opportunity, the Supreme Court should hold that a corporation or other legal entity of itself has no Free Exercise rights.

[133] *See*, *e.g.*, Tipling v. Pexall, 2 Bulst. 233 (1613) ("The opinion of Manwood, Chief Baron, was this, as touching corporations: that they are invisible, immortal, and that they have no soul. A corporation is a body aggregate; none can create souls but God: but the King creates them, and therefore they have no souls."); Sutton's Hospital, 10 Coke's Rep. 1, 32 (1613) ("A corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of law. They can't commit treason, nor be outlawed, nor excommunicated, for they have no souls, neither can they appear in person, but only by attorney."); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 477 (3d ed. 2003) ("Neither can a corporation be excommunicated; for it has no soul...."); 1 JOHN POYNDER, LITERARY EXTRACTS FROM ENGLISH AND OTHER WORKS 268 (1844) ("Corporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like."); Arthur W. Mechen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 253 (1911) ("From the earliest period of our judicial history, lawyers and judges have reiterated the doctrine that a corporation is an intangible legal entity, without body and without soul.").

The assertion the Mandate violates a corporation's Free Exercise rights falls for the simple reason that a corporation has no religion and therefore no Free Exercise rights with respect thereto.

B. The Religions at Issue in the Challenges to the Mandate Do Not Provide for the Corporate Practice of Religion

The question "what is a religion?" is one the Supreme Court has acknowledged exists,[134] but has studiously avoided answering. Given the breadth of world religions, any attempt at a comprehensive definition undoubtedly would be flawed for being, at minimum, under-inclusive. The three world religions tracing themselves to Abraham[135] accept a monotheistic deity as a matter of dogma, but this characteristic is lacking from Buddhism, Confucianism, and Hinduism.[136] Dualist and gnostic expressions of Abrahamic faiths also have lacked a single divinity.[137] Modern synergistic faiths such as Baha'i and Cao Dai present additional challenges to a comprehensive definition,[138] and the status of Xenu is beyond the scope of this Article.[139]

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[134] *See*, *e.g.*, United States v. Seeger, 380 U.S. 163, 183 (1965) ("We recognize the difficulties that have always faced the trier of fact in [cases that require defining religious belief.]").

[135] Judaism, Christianity, and Islam.

[136] KENNETH BOA, CULTS, WORLD RELIGIONS AND THE OCCULT 16 (1990) (contrasting Hinduism, Buddhism, and Confucianism with monotheistic belief systems).

[137] For example, the Albigenses of southern France appear to have been dualist, as were their possible predecessors, the Bogomils. 1 THE CATHOLIC ENCYCLOPEDIA 267–68 (Charles G. Herbermann et al. eds., 1907). At least the followers of the second century heretic Marcion were also dualist. *See* 9 THE CATHOLIC ENCYCLOPEDIA 645 (Charles G. Herbermann et al. eds., 1910).

[138] *See* 1 RELIGIONS OF THE WORLD: A COMPREHENSIVE ENCYCLOPEDIA OF BELIEFS AND PRACTICES 260, 264 (J. Gordon Melton & Martin Baumann eds., 2d ed. 2010) (describing how many famous religious figures from other religions, such as Jesus and Muhammad, are considered "Manifestations of God"); 2 RELIGIONS OF THE WORLD: A COMPREHENSIVE ENCYCLOPEDIA OF BELIEFS AND PRACTICES 502 (J. Gordon Melton & Martin Baumann eds., 2d ed. 2010) (discussing how Caodaism attempts to unite all other world religions).

[139] According to some, Xenu was the dictator of the "Galactic Confederacy" which brought billions of people to Earth seventy-five million years ago and killed them by detonating hydrogen bombs in the volcanoes around which the people were distributed. In the view of Scientology, the lingering spirits of these people cause the adversity affecting various people to this day. Knowledge of Xenu is supposed to be restricted to higher-level Scientology adherents, and it is said that those who attempt to bypass the prerequisite levels will come down with pneumonia. HUGH B. URBAN, THE CHURCH OF SCIENTOLOGY 103 (2011). The author does not want to get pneumonia.

The term "religion" in the Free Exercise Clause need not, however, be defined in order to determine whether a corporation itself has a Free Exercise right. Rather, that determination can be made through a third-party assessment of the religion of the individual shareholders of the business entities challenging the Mandate. As such, the question is not whether a corporation may exercise "a" religion, but rather whether a corporation may exercise "the" religion espoused by the shareholders of the corporation alleging, inter alia, that satisfying the Mandate's requirement would violate the corporation's religious beliefs. If the religion would not accept a corporation as a member, then it follows that the corporation has no Free Exercise protected rights within that faith.

Such limited investigation into religious structure is permissible in that some degree of due diligence is necessary to determine whether Free Exercise rights are at issue.[140] For example, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[141] the Supreme Court looked to the title of the employee at issue—"Minister of Religion, Commissioned"—and the prerequisites of that title—namely "a significant degree of religious training followed by a formal process of commissioning"[142]—to determine that the ministerial exemption was applicable.[143]

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[140] *See supra* note 122 and accompanying text.

[141] 132 S. Ct. 694 (2012).

[142] *Id.* at 707. In the Lutheran faith, a "commissioned minister" is a formal church officer traceable to the earliest days of Lutheranism. *See* THE AUGSBURG CONFESSION 22 (Charles P. Krauth trans., 1868) ("[N]o man should publicly teach in the Church, or administer the Sacraments, except he be rightly called…."); *see also* Petruska v. Gannon Univ., 462 F.3d 294, 307 n.10 (3d Cir. 2006) (finding that the plaintiff performed a "ministerial" function); EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 801 (4th Cir. 2000) ("Where no spiritual function is involved, the First Amendment does not stay the application of a generally applicable law such as Title VII to the religious employer unless Congress so provides. Our inquiry thus focuses on 'the function of the position' at issue and not on categorical notions of who is or is not a *'minister.'"* (citation omitted)); Penn v. N.Y. Methodist Hosp., No. 11-cv-9137 (NSR), 2013 WL 5477600 (S.D.N.Y. Sept. 30, 2013) (no ministerial exemption where hospital was not a religious institution).

[143] To provide but one additional example of the courts investigating the internal functioning of a religious body, the so-called "Parsonage Exemption" of the Internal Revenue Code necessitates investigation into who constitutes a "minister of the gospel." *See* Treas. Reg. § 1.107-1(a) (2002) (providing exemptions from gross income "[i]n the case of a minister of the gospel"); Treas. Reg. § 1.1402(c)-5(a) (1997) (defining "minister" for the purpose of certain tax benefits); Haimowitz v. Comm'r, 1997 T.C.M. (RIA) ¶ 97,039, ¶ 97,041 (1997) (finding that a synagogue administrator was not a "minister" because he did not perform religious rights and ceremonies); Silverman v. Comm'r, 57 T.C. 727, 731–32 (1972) (finding that a Jewish cantor employed full-time by a synagogue was a "minister"

Corporations do not partake in religious services, offer prayers, or receive sacraments.[144] A corporation cannot be baptized because it lacks a body upon which the water can flow or in which it can be immersed.[145] Issues of transubstantiation versus symbolic memorial versus symbolic parallel versus symbolic instrumentality have no bearing upon a corporation;[146] a corporation cannot partake in the sacrament to which these disputes relate. A corporation cannot be confirmed.[147] A priest will administer last rights to and counsel a prisoner in anticipation of execution;[148] similar rituals are not performed upon the dissolution of a corporation. Likewise, a corporation

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for tax purposes because he performed religious worship, sacerdotal training, and educational functions as specified by Jewish religious tenets); Lawrence v. Comm'r, 50 T.C. 494, 499–500 (1968) (finding that a commissioned but not ordained Baptist minister of education was not a "minister" because he was unable to officiate at baptisms, preside over or preach at worship services, or take part in other aspects of Baptist services); Congregation Ahavath Torah v. Englewood City, 21 N.J. Tax 318, 323 (N.J. Tax Ct. 2004) ("Instead, as with other members of the clergy, the character and extent of an individual's activities within the congregation will determine if the Parsonage Exemption applies."); *Ministers Audit Techniques Guide*, INTERNAL REVENUE SERV. 5 (2009), http://www.irs.gov/pub/irs-utl/ministers.pdf ("The duties performed by the individual are also important to the initial determination whether he or she is a duly ordained, commissioned, or licensed minister. Because religious disciplines vary in their formal procedures for these designations, whether an individual is 'duly ordained, commissioned, or licensed' depends on these facts and circumstances."). The Parsonage Exemption was recently held to be unconstitutional as a violation of the Establishment Clause. Freedom from Religion Found., Inc. v. Lew, No. 11-cv-626-bbc, 2013 WL 6139723, at *21 (W.D. Wis. Nov. 22, 2013).

[144] The following points are made against the sacraments of the Roman Catholic Church because most of the objections to the Mandate have been brought by members of that faith. *See, e.g.*, Monaghan v. Sebelius, 931 F. Supp. 2d 794, 798 (E.D. Mich. 2013); Complaint ¶ 3, SMA, LLC v. Sebelius, No. 0:13-cv-01375 (D. Minn. June 7, 2013); Complaint ¶ 15, Johnson Welded Prods., Inc. v. Sebelius, No. 1:13-cv-00609-ESH (D.D.C. Apr. 30, 2013).

[145] *See*, *e.g.*, CATECHISM OF THE CATHOLIC CHURCH 317, ¶ 1239 (revised ed. 1994) ("Baptism is performed in the most expressive way by triple immersion in the baptismal water. However, from ancient times it has also been … conferred by pouring the water three times over the candidate's head.").

[146] *See*, *e.g.*, *id.* at 334 (describing the symbolic and spiritual significance behind the Eucharist).

[147] *See* 2 THE CATHOLIC ENCYCLOPEDIA 329 (Charles G. Herbermann et al. eds., 1907) ("The *essential rite* of the sacrament follows. In the Latin rite, 'the sacrament of Confirmation is conferred through the anointing with chrism on the forehead, which is done by the laying on of the hand, and through the words: *'Accipe signaculum doni Spiritus Sancti'* [Be sealed with the Gift of the Holy Spirit.].").

[148] *See*, *e.g.*, Letter from Paul A. Beighley, Contract Chaplain, Greensville Correctional Center, to Editor, *in* VA. ADVOC. (July 2002), *available at* http://www.prisontalk.com/forums/archive/index.php/t-2541.html.

has no head or other extremities to which the holy oil used in the sacrament of extreme unction could be applied.[149]

The various individual plaintiffs assert, inter alia, that the corporation somehow expresses their religious views.[150] Such claims must fail as a basis for creating a religious identity in the business entity when the religion identified as the source of the objections to the Mandate will not accept the entity as a member.

C. Ab Initio *Lacking Free Exercise Rights, A Corporation Has No Rights Under the RFRA*

The Religious Freedom Restoration Act (RFRA)[151] was enacted in response to the Supreme Court's ruling in *Employment Division, Department of Human Resources v. Smith*.[152] The RFRA imposes upon the federal government[153] a strict scrutiny standard with respect to assertions that Free Exercise rights are being burdened.[154] To that end, if a federal statute—even one of neutral and general application—imposes a substantial burden upon a person's Free Exercise rights, the government must show that the statute is narrowly tailored to advance a compelling state interest.[155]

Although there has not yet been a determinative ruling on the point, the "person" protected under the RFRA must be a natural person; a corporation or legal entity created by state action does not exercise any religion or have any Free Exercise rights of and for itself, and such rights are a precondition

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[149] *See*, *e.g.*, CATECHISM OF THE CATHOLIC CHURCH, *supra* note 145, at 380 (explaining that the sacrament of "Anointing of the Sick" involves the priest "lay[ing] hands on the sick"); 5 THE CATHOLIC ENCYCLOPEDIA 716 (Charles G. Herbermann et al. eds, 1907) ("[T]he sacrament [of extreme unction] consists … in the unction with oil, specially blessed by the bishop, of the organs of the five external senses (eyes, ears, nostrils, lips, hands), of the feet and, for men ..., of the loins or reins ....").

[150] *E.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1285 (W.D. Okla. 2012).

[151] 42 U.S.C. § 2000bb-1(a) (1993).

[152] 494 U.S. 872, 879 (1990) (applying rational basis scrutiny to Free Exercise challenges to neutral laws of general application and holding that the Free Exercise Clause does not "relieve an individual of the obligation to comply with a valid and neutral law of general applicability" (internal quotation marks omitted)).

[153] *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that the RFRA does not apply to state and local governments, and that in enacting RFRA pursuant to section 5 of the Fourteenth Amendment, Congress lacked the authority to expand rights protected by section 1 of the Fourteenth Amendment).

[154] 42 U.S.C. § 2000bb-1(b) (1993).

[155] *Id.*

to the RFRA's application. The RFRA refers to a "person" without defining the term.[156] The Dictionary Act[157] defines "person" to include a "corporation," and this language has been blindly relied upon by some plaintiffs challenging the Mandate.[158] This path in no manner supports the position that Congress contemplated that a corporation has Free Exercise rights or that in fact such rights do exist. Rather, further scrutiny is necessary to determine whether the application of the Dictionary Act's definition of "person" and the inclusion of corporations are appropriate.[159] The government may not substantially "burden a person's exercise of religion;"[160] there must first be an ability to "exercise" religion before it can be burdened.[161] The question is not whether

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[156] *Id.*

[157] 1 U.S.C.A. § 1 (West 2013).

[158] *See*, *e.g.*, Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1211 (D.D.C. 2013) ("The Freshway companies largely depend on the Dictionary Act's elision of the differences in identity, hoping it applies to their RFRA claim."); Oral Argument at 37:05, Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013), *available at* http://media.ca7.uscourts .gov /sound/2013/lj.12-3841.12-3841_05_22_2013.mp3 ("When Congress passed RFRA it knew what it was drafting. It drafted it to say person. It did not give any exemption."); Oral Argument at 6:05, Grote v. Sebelius, 708 F.3d 850 (7th Cir. 2013), *available at* http://media .ca7.uscourts.gov/sound/2013/lj.13-1077.13-1077_05_22_2013.mp3 ("So when RFRA protects any exercise of religion for a person, which the Dictionary Act says is corporations....").

[159] The Dictionary Act's definition of "person" is qualified by "unless the context indicates otherwise." 1 U.S.C.A. § 1. *See*, *e.g.*, Rowland v. Cal. Men's Colony, 506 U.S. 194 (1993) (holding that a corporation is not a "person" within the ambit of 28 U.S.C. § 1915 and therefore is unable to proceed *in forma pauperis*); United States v. Havelock, 619 F.3d 1091 (9th Cir. 2010) (reversing a conviction for violation of 18 U.S.C. § 876(c) where threatening communication was addressed to a corporation, reasoning that "person" in § 876(c) is restricted to natural persons, notwithstanding the Dictionary Act); Isaacson v. Dow Chem. Co., 517 F.3d 129 (2d Cir. 2008) (noting that inclusion of "corporation" within "person" is a rebuttable presumption based upon the legislative history of the statute at issue); Adams v. United States, 420 F.3d 1049 (9th Cir. 2005) (holding that, notwithstanding the Dictionary Act, a corporation is not a person for purposes of tort immunity provided by the Federal Tort Claims Act); *see also* United States v. Hilton, 701 F.3d 959, 967 (4th Cir. 2012) ("The Dictionary Act further complicates this inquiry by treating the word 'individual' as a subset of the term 'person.' By making this distinction with regard to those two words, the Dictionary Act suggests that the two words are not synonymous."). In *Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002), the district court determined that the Foundation was not a "person" afforded RFRA protections. *Id.* at 83. The appeals court avoided the issue, holding that irrespective of whether RFRA applied, no burden existed. Holy Land Found. Relief & Dev. v. Ashcroft, 333 F.3d 156, 167 (D.C. Cir. 2004), *aff'g* 219 F. Supp. 2d 57 (D.D.C. 2002).

[160] 42 U.S.C. § 2000bb-1(a) (1993).

[161] Some of the corporate plaintiffs challenging the Mandate have sought to highlight their "religious" character by pointing to observance of religious holidays, provisions for

a corporation is a RFRA "person," but rather is a corporation a RFRA person

employee spiritual health, corporate policy statements, and charitable contributions. *E.g.*, Korte v. U.S. Dep't of Health & Human Servs., 912 F. Supp. 2d 735, 738 n.5 (S.D. Ill. 2012) ("In furtherance of their Catholic faith, the Kortes both strongly support, financially and otherwise, Catholic fundraisers and other events, including, but not limited to, the STYDEC Ghana Project, restoration of their parish church, annual church picnic, and annual parish school auction." (internal quotation marks omitted)); Complaint ¶ 42, Grote Indus., LLC v. Sebelius, 914 F. Supp. 2d 943 (S.D. Ind. 2012) (No. 4:12-cv-00134-SEB-DML) ("Under the Grote family's direction, Grote Industries has donated significant amounts to Catholic parishes, schools, evangelical efforts, and charitable causes averaging approximately $98,000 every year since 2007. This practice has been in place for many years prior to 2007."); Complaint ¶ 6, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. 5:12-cv-01000-HE) ("They give millions of dollars from their profits to fund missionaries and ministries around the world."); *id.* ¶ 43 ("[T]he stores use a carefully managed music playlist which prominently features inspirational Christian songs."); *id.* ¶ 47 (describing newspaper advertisements taken out around Christmas and Easter, "celebrat[ing] the religious nature of the holidays"); Complaint ¶ 27, Monaghan v. Sebelius, 931 F. Supp. 2d 794 (E.D. Mich. 2012) (No. 2:12CV15488) ("Some of the amenities and services Plaintiff Domino's Farms offers to its tenants include an *on-site Catholic chapel* ... and Catholic bookstore."); *id.* ¶ 28 ("The on-site chapel offers Mass four times daily and twenty three [sic] times a week."); *id.* ¶ 30 ("Plaintiff Domino's Farms food services offer healthy menu options, as well as providing Catholic menu options such as fish during the Fridays of lent.").

Still, they are not *ab initio* religious corporations. For example, upon the publicly available record of Hobby Lobby, there is nothing particularly "religious" about the organization. For example, the Amended and Restated Certificate of Incorporation filed by the Oklahoma Secretary of State on February 29, 1996, sets forth the purpose of the corporation as "to engage in any lawful act or activity for which corporations may be organized under the general corporation law of the State of Oklahoma." The Amended and Restated Certificate of Incorporation filed by the Oklahoma Secretary of State on March 31, 1994, repeated the language of the original certificate filed November 28, 1997, setting forth the purpose of the corporation in fifteen distinct paragraphs, none of which referenced religious belief or the Catholic faith, but which did include: the capacity to operate truck lines and other transportation facilities, to borrow money, to deal in royalties and other interests in minerals, and to own or lease mines and mineral lands. The Amended and Restated Articles of Incorporation of Autocam Corporation filed with the Michigan Secretary of State on August 31, 2009, describe the purpose of the corporation "as any activity within the purposes for which corporations may be organized under the Business Corporation Act of Michigan." While Annex Medical has asserted through its attorney that it has a "faith based charter," see Christopher Snowbeck, *Minnetonka Firm Argues Against Contraceptive Coverage Mandate*, TWINCITIES.COM (Oct. 24, 2013), http://www.twincities.com/localnews/ci_24380287/minnetonka-firm-argues-against-contraceptive-coverage-mandate, that entity's articles of incorporation are silent as to any religious element and provide in part that "the purposes of the corporation are general business purposes." Absent a holding that at least a for-profit business entity does not have of itself Free Exercise rights, the courts are going to find themselves in a morass of determining whether a particular entity is behaving in a sufficiently religious way to warrant Free Exercise rights and consequent rights under RFRA.

exercising religion.[162] Because corporations themselves have no religion, they have no protection against the infringement thereof based on the RFRA.[163]

The RFRA's allocation of burden in determining the legality of an asserted infringement of rights protected by the Free Exercise Clause does nothing to create a right protected by the Free Exercise Clause. Although the RFRA may protect a "person's" Free Exercise rights, it cannot create in a "person," however defined, Free Exercise rights.[164] *Ab initio* lacking Free Exercise rights that could be protected by the RFRA, the RFRA has no application to business entities.[165]

D. The Corporation is Not a Nominee Through Which the Shareholders Engage in Business

The suggestion that the shareholders carry on business through a corporation is untenable. A corporation—i.e. a legal person—conducts business for itself and on its own account; it does not conduct the business of the shareholders, who are distinct persons.[166] The corporation is not an agent

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[162] It was the failure to recognize this two-part analysis that led to the failure of the majority decision in *Korte*. Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013). There the Court held that "[t]he corporate plaintiffs are 'persons' under RFRA and may invoke the statute's protections." *Id.* at 666. *See also id.* at 675 ("[W]e take it as both conceded and noncontroversial that the use of the corporate form ... do not disable an organization from engaging in the exercise of religion within the meaning of RFRA (or the Free Exercise Clause, for that matter)."). It then strained to find authority for Free Exercise by corporate entities, pointedly ignoring the cases that have clearly held to the contrary (*see supra* notes 124–30 and accompanying text). Still it never linked the religious exercise/belief element to the corporate form and never explaining how a corporation can have a religious view that is protected by RFRA from a burden, facts recognized by Judge Rovner in her dissent. 735 F.3d at 694–95 (Rovner, J., dissenting).

[163] *See*, *e.g.*, Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394 (E.D. Pa. 2013) (determination that a corporation has no Free Exercise rights compels the conclusion of no rights under RFRA), *aff'd*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013). *But see* Beckwith Electric Co., Inc. v. Sebelius, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *8 (M.D. Fla. June 25, 2013) ("While the issue is a close one, the Court concludes that a corporation is a 'person' under the First Amendment and the RFRA.").

[164] By way of analogy, Congress could not extend the protections afforded by the Free Exercise Clause to purely philosophical or moral views that are not based upon a religious faith. *See supra* note 122.

[165] *See also* Gilardi v. Sebelius, 926 F. Supp. 2d 273, 279 n.3 (D.D.C. 2013) ("Because the Court finds that the Freshway Corporations do not exercise religion, the Court does not reach the question of whether they are 'persons' within the scope of RFRA.").

[166] This rule can be traced back to the Roman Civitas, the forerunner of today's corporation. *See* RUDOLPH SOHM, THE INSTITUTES 190, § 37 (James Crawford Ledlie trans., 3d

acting on behalf of the shareholders; were that the case, then the shareholders would be personally responsible for all the debts and obligations incurred by the corporation on behalf of its principals, and the corporation would not be liable thereon.[167]

It bears repeating that it is not the shareholders who direct and manage the corporation, but rather the Board of Directors with its decisions being implemented by the corporate officers.[168] The Board, not the shareholders, determines corporate policy.[169] That the Board may be comprised of all or some subset of the persons who are the shareholders does not alter the fact that the positions are legally distinct.[170]

In several of the Mandate cases to date, the question of whether the corporation has standing to object to the Mandate has been avoided by permitting the corporation to represent, in effect, the interests of the various shareholders.[171] Proceeding on this basis has not yet been justified. On examination, it should be rejected, and the facts of the Mandate cases demonstrate that it is inapplicable *ab initio*.

The Supreme Court set forth the test for representational standing in *Powers v. Ohio*,[172] there addressing whether a criminal defendant may

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ed. 1907) ("Rights and liabilities of a corporation do not mean joint rights and joint liabilities of the members, but sole rights and sole liabilities of another person, an invisible, a juristic person, namely, the corpus.").

[167] *See* 2 RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 6.01 (2006); *see also* Moline Props., Inc. v. Comm'r, 319 U.S. 436, 440 (1943).

[168] *See supra* note 85 and accompanying text.

[169] *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 220 (1933) (explaining the basic relationship between a Board of Directors and the shareholders).

[170] In the instance of Hobby Lobby, the company behind the eponymous case, the corporation is even further removed from the position of those natural persons whose religious beliefs give rise to the objection to the Mandate. At least the voting stock of the corporation, which presumably holds the exclusive right to elect the Board of Directors, is not owned by the members of the Green family, but rather by a trust of which they are beneficiaries. *See* Complaint ¶ 38, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. 5:12-cv-01000-HE).

[171] *See*, *e.g.*, Tyndale House Publishers v. Sebelius, 904 F. Supp. 2d 106, 114 (D.D.C. 2012) ("This Court, like others before it, declines to address the unresolved question of whether for-profit corporations can exercise religion within the meaning of the RFRA and the Free Exercise Clause. Instead, the Court will assess whether Tyndale has standing to assert the free exercise rights of its owners." (citations omitted)); Legatus v. Sebelius, 901 F. Supp. 2d 980, 988 (E.D. Mich. 2012) ("For purposes of the pending motion, however, Weingartz Supply Co. may exercise standing in order to assert the free exercise rights of its president, Daniel Weingartz, being identified as 'his company.'" (citation omitted)).

[172] 499 U.S. 400 (1991).

assert the Equal Protection rights of those discharged from a petit jury by means of preemptory challenges. Relying upon *Singleton v. Wulff*,[173] the Court allowed such representational standing:

> [P]rovided three important criteria are satisfied: The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute, the litigant must have a close relation to the third party, and there must exist some hindrance to the third party's ability to protect his or her own interests.[174]

The present disputes are entirely unlike the question addressed in *Powers*, namely the vindication of the rights of those wrongly excluded from jury duty. Allowing the criminal defendant to litigate those claims provided an effective voice for the dismissed potential jurors, who faced "considerable practical [financial] barriers to suit" and had "little incentive to set in motion the arduous process needed to vindicate his own rights."[175] The Mandate cases are curious in that both the business entities and their owners are present before the courts; it cannot be said that one or the other needs to protect the interests of an absent person.[176] With all of the purportedly burdened parties present and able to vindicate the asserted wrong, the third element of representational standing is not satisfied. Ergo, there is no basis for representational standing under *Powers*.

In *Korte v. U.S. Department of Health & Human Services*,[177] the court permitted the corporation to proceed on the basis that it represented the

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[173] 428 U.S. 106 (1976).

[174] *Powers*, 499 U.S. at 411 (citations omitted); *see also* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977) (requiring for representational standing that the entity otherwise have standing to bring suit on its member's behalf, that the interest to be protected be germane to the organization's purposes, and that there be no need for the member's participation).

[175] *Powers*, 499 U.S. at 415.

[176] *E.g.*, O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1154 (E.D. Mo. 2012) (identifying the plaintiffs as O'Brien Industrial Holding, LLC, and Frank R. O'Brien, Jr.); Complaint, Eden Foods, Inc. v. Sebelius, No. 13-11229, 2013 WL 1190001 (E.D. Mich. Mar. 22, 2013) (No. 2:13-cv-11229-DPH-MAR) (identifying the plaintiffs as Eden Foods, Inc., and Michael Potter, its sole shareholder); Complaint at ¶ 2, Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12-CV-1123) (listing as plaintiffs the individual owners of Hercules Industries, Inc.); Complaint, Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394 (E.D. Pa. 2012) (No. 5:12-cv-06744-MSG) (listing as plaintiffs Conestoga Wood Specialties Corp., Norman Hahn, Norman Lemar Hahn, and Anthony H. Hahn), *cert. granted*, 134 S. Ct. 678 (2013).

[177] Korte v. U.S. Dep't of Health & Human Servs., 912 F. Supp. 2d 735 (S.D. Ill. 2012).

religious beliefs of the shareholders, citing without discussion *NAACP v. Button*.[178] In *Button*, the NAACP challenged a Virginia law dealing with the ethical rules governing attorneys that had a limiting effect on the NAACP's advocacy rule. The Virginia law was struck down on the basis that it violated the associational rights of NAACP members.[179] Nothing about this decision, which relates to corporate representation of the associational rights of those acting through the corporate entity, the corporation as well enjoying associational rights, has bearing upon a corporation's associational representation of its shareholder's personal Free Exercise rights, which the corporation cannot exercise on its own account.

Further, under *Powers*, even where representational standing is possible, the representative must vindicate a right of the absent party; it is not the right of the representative that is protected but that of the represented.[180] It necessarily follows that if the represented has no right that has been violated, then there is no redress for the representative to pursue. There is no aggregation or increase in net rights by reason of the representation. The party undertaking the representation, for itself, has no greater rights than it would absent the representation, and the represented party has no greater rights than would be enjoyed absent the representation.

Several of the plaintiffs have relied on one or both of a pair of decisions from the Ninth Circuit for the proposition that a corporation, even a secular, for-profit corporation, may represent the Free Exercise rights of the corporation's shareholders.[181] This reliance is unjustified. Both *Townley Engineering & Manufacturing Co*. and *Stormans, Inc. v. Selecky* failed (1) to set forth an analytic basis for the corporation to represent its shareholders' rights or (2) to explain why proceeding on that ground was preferable to simply requiring the shareholders to proceed individually. These failings have been repeated in *Tyndale House Publishers, Inc. v. Sebelius*, *Legatus v. Sebelius*, and similar cases.[182] These rulings are simply too thin a basis

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[178] 371 U.S. 415 (1963).

[179] *Id.* at 428–29.

[180] *Powers*, 499 U.S. at 401.

[181] *See* Stormans, Inc. v. Selecky, 586 F.3d 1109, 1119 (9th Cir. 2009) ("Intervenors argue that Stormans, a for-profit corporation, lacks standing to assert a claim under the Free Exercise Clause. We decline to decide whether a for-profit corporation can assert its own rights under the Free Exercise Clause and instead exercise the rights at issue as those of the corporate owners."); *id.* at 1120 ("[A] corporation has standing to assert the free exercise right of its owners."); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 620 (9th Cir. 1988) ("Townley presents no rights of its own different from or greater than its owners' rights.").

[182] Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 118 (D.D.C. 2012) ("Tyndale has standing to assert its owners' free exercise rights under the third-party standing

for the supposition that a secular corporation may assert its shareholders' religious rights, especially as these rulings do not address the gulf between the corporate person and its shareholders.[183]

It is not contested that individuals may associate together, including in the corporate form, to collectively exercise their Free Exercise rights. It does not, however, follow that a for-profit venture may itself enjoy Free Exercise rights. In the former instance, people voluntarily associate for the purpose of religious activities, and an individual dissatisfied with the dictates of a religious faith is not compelled to remain in and be bound thereby. In the latter instance, people join the for-profit venture as shareholders, directors, officers, and employees for any of a variety of reasons. Each has not necessarily joined in order to participate in a "religious mission" imposed, or sought to be imposed, upon the venture by some constituent body thereof.[184]

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doctrine...."); Legatus v. Sebelius, 901 F. Supp. 2d 980, 988 (E.D. Mich. 2012) ("For the purposes of the pending motion, however, Weingartz Supply Co. may exercise standing in order to assert the free exercise rights of its president, Daniel Weingartz, being identified as 'his company.'" (citation omitted)); Beckwith Elec. Co. v. Sebelius, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *12 (M.D. Fla. June 25, 2013).

[183] The Third Circuit rejected an effort to utilize the reasoning of *Townley*/*Stormans* to permit the corporate entity to assert the Free Exercise rights of its shareholders. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't Health & Human Servs., 724 F.3d 377, 387 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013). *See also* Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1214–15 (D.D.C. 2013) (critiquing the *Townley* decision and describing it as providing "illusory" support for the plaintiff's arguments of representational standing); Mersino Mgmt. Co., v. Sebelius, No. 13-cv-11296, 2013 WL 3546702, at *13 n.10 (E.D. Mich. 2013); Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employer*s, 16 GREEN BAG 2d 235, 240 (2013) (criticizing the lack of analysis employed in *Townley*, *Stormans*, and *Tyndale* in permitting a corporation to represent its owners' Free Exercise rights: "To the contrary, its holding is best described as a statement of a conclusion rather than the result of an analytic process.").

[184] *Compare* James D. Nelson, *Conscience, Incorporated*, 2014 MICH. ST. L. REV. (forthcoming 2013), *available at* http://ssrn.com/abstract=2247051 (last visited Jan. 12, 2014) ("Business corporations should not generally be entitled to free exercise exemptions, because they are constructed out of a pattern of detached individual relationships that do not lead to shared interests in collective development of conscience."), *with* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1133 (10th Cir. June 27, 2013) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) (noting that courts have "recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and *the exercise of religion*. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.")), *cert. granted*, 134 S. Ct. 678 (2013). On this point, the Tenth Circuit was simply in error. Persons do not associate in a commercial

The various corporations at the focus of this discussion lack a Free Exercise right that they may vindicate for their own account. There are no absent owners whose rights could be violated were the corporations prevented from acting in a representational capacity. Additionally, although the Mandate may impose an indirect burden upon the corporations by defining minimum terms of health insurance policies,[185] the corporate representation of its shareholders' interests does not impose that indirect burden upon the shareholders. Simply put, the necessary elements of representational standing are absent, and, even were that not the case, there remains no actionable injury consequent to the Mandate.

E. The Shareholders May Not Waive the Legal Separateness of the Corporation on a Whim

Having chosen to organize a business in the corporate form, the shareholders may not on a whim elect to ignore certain consequences of that choice; the separate legal personhood of the corporation must be respected.[186] As set forth by the Supreme Court in *Schenley Distillers Corp. v. United States*, "[o]ne who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public."[187] In this decision, the Court

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venture for religious reasons, but rather for economic gain. To suggest those who undertake employment with corporations that evidence a religious element, *e.g.*, Michael A. Helfand, *What is a "Church"?: Implied Consent and the Contraception Mandate*, 21 J. CONTEMP. LEGAL ISSUES (forthcoming 2013), agree to be bound thereby glosses over a variety of issues including the propriety of requiring prospective employees to undertake employer due diligence, the nature and sufficiency of indicia that would lead the employee to appreciate the religious character of the employer, the problems of possible changes in ownership/management during the term of employment, and the absence of linkage between often ambiguous indicia and particular limits on the terms of the employment agreement.

[185] 42 U.S.C.A. § 18022(a)–(b) (West 2013).

[186] The author specifically disclaims considering whether the Mandate, applied to an insurance policy maintained for the employees of a sole proprietorship, would raise Free Exercise Clause or RFRA issues. None of the Mandate cases to date have involved those facts.

[187] 326 U.S. 432, 437 (1946) (per curiam). *See also* Kreisler v. Goldberg, 478 F.3d 209, 214 (4th Cir. 2007) ("The fact that a parent corporation has an ownership interest in a subsidiary, however, does not give the parent any direct interest in the *assets* of the subsidiary. Although Bask could have established an ownership interest in the property, it chose not to do so. Instead, it created an LLC for the purpose of holding title to the property. Having assumed whatever benefits flowed from that decision, it cannot now ignore the existence of the LLC in order to escape its disadvantages."); Michael J. Gaertner, Note, *Reverse*

rejected both the ability of a corporate parent to object to a claimed injury to its wholly-owned subsidiary[188] and the conflation of distinct corporations.[189]

While it may be asserted that a corporation is simply a matter of form[190]— an assertion that is demonstrably false—it is a form that matters. The very substance of corporate law, as well as a good deal of the law of agency, is the recognition of a legal person separate from its shareholders.[191] The form is not some fiction to be set aside by the shareholders when it is inconvenient for their desired goals.

In addition to the many cases already cited,[192] a pair of tax decisions highlights the absolute reality of both the corporate form and its distinction from the shareholders. In *Moline Properties, Inc. v. Commissioner*,[193] the shareholder argued the gain on the sale of corporate-owned property should

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Piercing the Corporate Veil: Should Corporation Owners Have It Both Ways?, 30 WM. & MARY L. REV. 667, 683 (1989):

> First, courts view the corporation owner as having made an affirmative and intelligent choice to operate her business in the corporate form. According to this view, the corporation owner considered the respective advantages and disadvantages of the available business structures before selecting the corporate organization as the preferred mode of operation. As a result of this inquiry, the corporation owner was aware that the law views a corporation and its owners as separate entities. Because the corporation chose the corporate form with knowledge of this fact, she cannot now decry her separate legal existence.

[188] *Schenley*, 326 U.S. at 435 ("The district court rightly held that the parent corporation had no standing to sue. It did not ask that a permit be issued to it, and its sole interest in the permit sought for its co-appellant was that of a stockholder. We have held that a minority stockholder of a carrier corporation cannot bring suit to set aside a commission order against the corporation.... For the parent is adequately represented for purposes of suit by the subsidiary whose conduct of the litigation it controls.").

[189] *Id.* at 432 ("[Separate] corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person.").

[190] *See*, *e.g.*, Beckwith Electric Co. v. Sebelius, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498, at *11 (M.D. Fla. June 25, 2013) ("It would truly be form over substance to say there is a meaningful distinction between Beckwith Electric and Beckwith when it comes to religion."); Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1218 (D.D.C. 2013) (describing the effect of incorporation as being a "fiction").

[191] *See supra* notes 77–105 and accompanying text; *see also* Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563 (1987) (explaining how the law treats a corporation as a separate legal entity).

[192] *See*, *e.g.*, *supra* notes 77–105 and accompanying text.

[193] 319 U.S. 436 (1943).

be attributed not to the corporation but to its sole shareholder.[194] The Supreme Court rejected this effort to disregard the corporate form.[195] In contrast, in *United States v. Cumberland Public Service Co*.,[196] the Court rejected the government's argument to treat what was structured as a sale of assets made by the shareholders, to whom the assets had been distributed by the corporation, as the sale of assets directly by the corporation. When *Cumberland* was decided, "[a] corporation selling its physical properties [was] taxed on capital gains resulting from the sale. There [was] no corporate tax, however, on distribution of assets in kind to shareholders as part of a genuine liquidation."[197] The IRS sought to collapse the transaction's steps,[198] but the Supreme Court respected the separateness of the corporation and its shareholders.

The separate legal personhood of the corporation may be set aside in exceptional circumstances[199] under the equitable doctrine known as "piercing the veil." In the classic "veil piercing" case, a corporation's creditor demonstrates that the liability shield normally afforded the shareholders should be set aside on one of several grounds.[200] As such, piercing is a remedy that

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[194] *Id*. at 436 ("Petitioner [the corporation] seeks to have the gain on sales of its rental property treated as the gain of its sole stockholder and its corporate existence ignored as merely fictitious.").

[195] *Id.* at 440.

[196] 338 U.S. 451 (1950).

[197] *Id.* at 452 (footnotes omitted). This rule, commonly known as the General Utilities Doctrine, was repealed in 1986. *See*, *e.g*., 1 BORIS I. BITTKER AND JAMES S. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 8.20 (7th ed. 2006).

[198] *Cumberland*, 338 U.S. at 453 ("Upon this sale by the shareholders, the Commissioner assessed and collected a $17,000 tax from the corporation on the theory that the shareholders had been used as a mere conduit for effectuating what was really a corporate sale.").

[199] *E.g.*, CNH Capital Am. LLC v. Hunt Tractor, Inc., No. 3:10-CV-350, 2013 WL 1310878, at *17 (W.D. Ky. Mar. 26, 2013) (quoting Schultz v. Gen. Electric Healthcare Fin. Servs., Inc., 360 S.W.3d 171, 174 (Ky. 2012)) ("Generally, a corporation is viewed as a separate legal entity, and a court should disturb the notion of corporate separateness 'only in the rarest of circumstances.'").

[200] *E.g.*, *In re* Blatstein, 192 F.3d 88, 100 (3d Cir. 1999) ("The 'classical' piercing of the corporate veil is an equitable remedy whereby a court disregards 'the existence of the corporation to make the corporation's individual principals and their personal assets liable for the debts of the corporation.'"); STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 1:1 (2012) ("The 'veil' of the 'corporate fiction,' or the 'artificial personality' of the corporation, is 'pierced,' and the individual or corporate shareholder exposed to personal or corporate liability, as the case may be, when a court determines that the debt in question is not really a debt of the corporation, but ought, in fairness, to be viewed as a debt of the individual or corporate shareholder or shareholders." (emphasis omitted) (citations omitted)); I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496, 517 (1912) ("When the conception of corporate entity is employed to defraud creditors, to evade

permits a corporation's judgment-creditor to reach shareholder assets that have not been devoted to the corporate enterprise.[201] In a typical reverse pierce—coined by Gregory Crespi and commonly referred to as an outsider reverse pierce—a shareholder's creditor seeks to access corporate assets to satisfy the shareholder's debt.[202] In an insider reverse pierce, the shareholder seeks to set aside the partition between the shareholder and the assets devoted to the corporate enterprise in order to regain personal ownership of those assets.[203]

Professor Stephen Bainbridge has proposed an analytic framework for the inside reverse pierce as a means of identifying which corporations may assert the shareholders' religious beliefs in opposition to the Mandate.[204] While recognizing the conceptual problems with reverse veil piercing,[205] his analysis fails to acknowledge the fact that courts have rejected most efforts at reverse veil piercing and that insider reverse piercing is an abuse of the veil piercing doctrine.

As to the many rejections of reverse veil piercing, courts almost always respect the distinction between, on one hand, the owner and, on the other hand, the legal entity and its assets.[206] Regarding the abuse of the concept of veil

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an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard to corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons.").

[201] PRESSER, *supra* note 200, § 1:1.

[202] Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. CORP. L. 33, 57 n.111 (1990).

[203] *Id.* at 37.

[204] Bainbridge, *supra* note 183, at 246–49.

[205] *Id.* at 245–46.

[206] *See*, *e.g.*, Lattanzio v. COMTA, 481 F.3d 137, 138 (2d Cir. 2007) (per curiam) (declaring that a sole member of an LLC, who is not an attorney, may not represent the LLC in court); Terry v. Yancey, 344 F.2d 789, 790–91 (4th Cir. 1965) ("[W]here an individual creates a corporation as a means of carrying out [the individual's] business purposes [the individual] may not ignore the existence of the corporation in order to avoid its disadvantages."); NAF Holdings, LLC v. Li & Fung (Trading) Ltd., No. 10 Civ. 5762(PAE), 2013 WL 489020, at *7 (S.D.N.Y. Feb. 8, 2013) (determining that a parent company as a sole corporate shareholder may not directly bring suit to vindicate a claim of its wholly owned subsidiary); Finley v. Takisaki, No. C05-1118JLR, 2006 WL 1169794, at *2 (W.D. Wash. Apr. 28, 2006) (finding that members of an LLC lacked standing to assert a claim for injury to the LLC); Carey v. Howard, 950 So. 2d 1131, 1136-37 (Ala. 2006) (finding that members of an LLC lacked standing to sue for declaratory relief with respect to an option agreement between the LLC and a third party); Zipp v. Florian, No. CVN03101980, 2006 WL 3719373, at *4 (Conn. Super. Ct. Nov. 13, 2006) (finding that a member of an LLC

piercing, veil piercing itself is not a cause of action, but rather a remedy;[207] it is not a mechanism for a shareholder to access corporate assets for personal utilization outside of an interim or liquidating distribution from the venture.[208] Further, in the few cases in which insider reverse piercing has been permitted, it was permitted to allow an entity's owner to take on the benefit of an asset owned by the entity.[209] Those challenging the Mandate seek to effect an

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lacked standing to bring suit based upon damage to property owned by the LLC); Smith v. Bear, Inc., No. 2010-CA-001803-MR, 2013 WL 1352148, at *3 (Ky. Ct. App. Apr. 5, 2013) (stating that a sole shareholder of a corporation, who is not an attorney, may not represent the corporation in court); Ne. Realty, L.L.C. v. Misty Bayou, L.L.C., 920 So. 2d 938, 939, 941 (La. Ct. App. 2006) (finding that members of an LLC lacked standing to intervene in an action against an LLC to quiet tax title); Cortellesso v. Town of Smithfield Zoning Bd. of Review, 888 A.2d 979, 981 (R.I. 2005) (finding that a sole member of an LLC lacked standing to appeal a zoning decision on the LLC's property); *see also* Gaertner, *supra* note 187, at 682:

> The traditional judicial response to the reverse pierce is an absolute refusal to pierce the corporate veil in favor of those who created it, the corporation owners. Courts base their refusal to reverse pierce on a strict adherence to the separate personality doctrine embodied in traditional corporate law. The "separate personality" approach enjoys widespread support and is clearly the majority view.

[207] *See*, *e.g.*, Green v. Freeman, 749 S.E.2d 262, 271 (N.C. 2013) ("The doctrine of piercing the corporate veil is not a theory of liability. Rather, it provides an avenue to pursue legal claims against corporate officers or directors who would otherwise be shielded by the corporate form."); Inter-Tel Techs., Inc. v. Linn Station Props., LLC, 360 S.W.3d 152, 155 (Ky. 2012); PRESSER, *supra* note 200, § 3:2 (quoting Peacock v. Thomas, 516 U.S. 349 (1996)) ("'Even if ERISA permits a plaintiff to pierce the corporate veil, such piercing is not itself an independent ERISA cause of action and cannot independently support federal jurisdiction.'"). A similar holding was recently issued by the Supreme Court in a CERCLA contest. *See* U.S. v. Bestfoods, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43, 46 Env't. Rep. Cas. (BNA) 1673, 28 Envtl. L. Rep. 21225, 157 A.L.R. Fed. 735 (1998)."); Stephen M. Bainbridge, *Abolishing LLC Veil Piercing*, 2005 U. ILL. L. REV. 77, 79 n.14.

[208] For that reason, namely the bastardization of a remedy into a cause of action, the very concept of inside reverse piercing should be entirely rejected. That is a discussion, however, for another day.

[209] Professor Bainbridge utilizes as the archetype of insider reverse piercing *Cargill, Inc. v. Hedge*, 375 N.W.2d 477, 478 (Minn. 1985), a case in which the shareholder successfully sought a homestead exemption for a home she had transferred to her wholly owned corporation. It needs to be recognized that numerous other cases have rejected efforts by owners to reverse pierce in order to claim the homestead exemption. *E.g.*, *In re* Breece, 487 B.R. 599 (B.A.P. 6th Cir. Jan. 18, 2013) (refusing to allow a sole member of an LLC to reverse pierce the LLC holding title to the house in which she resided); *In re* Hecker, 414 B.R. 499 (Bankr. D. Minn. 2009) (rejecting insider reverse piercing to claim homestead exemption); Ala. Op. Att'y Gen., No. 2007-043, 2007 WL 505806 (Feb. 9, 2007) (stating

insider reverse pierce not to take on a benefit of the entity but rather a burden, and then to object to the "imposition" of that burden.[210]

Even as courts are exceptionally reluctant to set aside the veil in order to permit the owners to enjoy the benefit of entity assets, courts should categorically reject an effort to reverse pierce for the purpose of claiming personal liability on an entity obligation and then asserting the now assumed obligation infringes on the owners' Free Exercise rights. One is reminded of the classic description of chutzpah, namely killing your parents and then throwing yourself on the mercy of the court because you are an orphan.[211] Similarly, a shareholder may not engage the extraordinary remedy of an insider reverse pierce and then object to the consequences thereof.

F. The Burdens Imposed Upon a Corporation by the Mandate Are Not Imposed on the Owners Thereof

Up to this point, the focus of the discussion has been upon standing. The corporation does not have standing to object to a legal obligation under either the Free Exercise Clause or the RFRA and the shareholders do not have standing to object to the corporation's legal obligations based on their personal religious beliefs. There is also the point that shareholder standing is

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that a homestead exemption is not available for property owned by an LLC)*; see also In re* Stella, 470 B.R. 1, 13–16 (Bankr. D. Mass. 2012) (precluding the claiming of a homestead exemption in property held in trust); 3519-3513 Realty, LLC v. Law, 967 A.2d 954, 955–56 (N.J. Super. Ct. App. Div. 2009) (holding the member of an LLC could not utilize the statutory right of property owner to "personally occupy a unit" in a multi-unit dwelling when the LLC, and not the member, was the owner of the property).

[210] It is beyond the scope of this discussion, but there is a question as to whether Hobby Lobby and/or the Green family may challenge the Mandate when they failed to utilize an available regulatory exemption. Plans that are "grandfathered" are exempt from the Mandate, and Hobby Lobby failed to grandfather its plans. Complaint at ¶ 59, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. Civ-12-1000-HE) ("Before the Mandate was issued, Hobby Lobby made the decision not to retain grandfathered status under the Affordable Care Act. Neither its 2011 nor its 2012 plan materials included a notice of grandfather status. Therefore Hobby Lobby's insurance plan is not grandfathered."). *See* 45 C.F.R. § 147.140(a)(1)(i); 26 C.F.R. § 54.9815-1251T(a)(1)(i); 29 C.F.R. § 2590.715-1251(a)(1)(i)."). Having apparently intentionally forsaken protection from the Mandate's requirements, it is uncertain whether Hobby Lobby or the Greens may now legitimately claim the Mandate imposes an unjust burden.

[211] *See*, *e.g.*, Wingate v. Celebrity Cruises, Ltd., 79 So. 3d 180, 183 n.5 (Fla. Dist. Ct. App. 2012); Steven B. Spector, *Chutzpah and the Law*, 87 LAW LIBR. J. 357, 357 (1995); *see also* J.A. SIMPSON & E.S.C. WEINER, 3 THE OXFORD ENGLISH DICTIONARY 209 (2d ed. 1991) (defining the term "chutzpah").

lacking due to the attenuated link between a shareholder and the conduct that gives rise to the asserted religious objections.

Even assuming all shareholders of the various corporations that have brought suits challenging the Mandate object to all or some aspects thereof,[212] it does not follow that the shareholders are burdened by the Mandate.[213] Rather, the shareholders are so distant from the Mandate that they have no standing to object thereto.

The burden of the Mandate is not imposed upon employers, but rather initially upon the group insurance plan[214] and only secondarily upon the

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[212] To date, the courts have not considered how an objection to the Mandate by some, but fewer than all, shareholders would be addressed. If some but not all shareholders hold beliefs, and if the religious beliefs of the shareholders can be attributed to the corporation (a position rejected by this analysis), is it only the beliefs of the majority shareholder block? Consider a corporation with two classes of stock, Class A (voting) and Class B (non-voting). The Class A stock represents twenty percent of the total equity, but it alone elects the board of directors. If the sole shareholder of the Class A stock holds religious beliefs in opposition to the Mandate, but the holders of the Class B stock do not hold those views or even support the Mandate, is the examination of the "corporation's religious views" based upon those of the shareholder empowered to elect the board of directors or upon those of all shareholders irrespective of their capacity to elect directors? Alternatively, assume the reverse: the holders of the Class A stock have no objection to the Mandate. There is then a change of control, and the new sole holder of the Class A stock has strong and sincere objections to the Mandate. May that view be newly ascribed to the corporation, giving it the opportunity to require its employee group insurance plan to exclude, based upon the Free Exercise and RFRA rights of the new Class A shareholder, the coverage required by the Mandate? If the shares are held in trust, would it be appropriate to examine the views of the trustees, as the title owners of the shares (*see*, *e.g.*, 1 RESTATEMENT (THIRD) OF TRUSTS § 2 (2003); *id.* § 3(3); RESTATEMENT (SECOND) OF TRUSTS § 2 (1959); *id.* § 2, cmts. d, h; *id.* § 3(3)), or the views of the trust's beneficiaries?

[213] Even if The Blunt Amendment had passed, *see supra* notes 67–68 and accompanying text, it would not follow that the religious beliefs of the shareholders would be controlling as to the availability of a conscience objection from the requirements of the Mandate. Under the language proposed by The Blunt Amendment, coverage could be declined on the basis of the "religious beliefs or moral convictions of the sponsor, issuer or other entity offering the plan" or on the basis it "is contrary to the religious beliefs or moral convictions of the purchaser or beneficiary of the coverage." With respect to a for-profit business venture, the terms "sponsor," "issuer," "other entity offering the plan," and "purchaser" would refer to the corporation or similar business entity, not to its constituent owners. Admittedly, under any fair reading of The Blunt Amendment, Senator Blunt assumed the business entity would constitute the "purchaser" of the plan, and the religious and moral views of its owners would be ascribed to the entity. That is not, however, what The Blunt Amendment said. Regardless, that analytic path is structurally flawed for the reasons demonstrated herein.

[214] *See* 42 U.S.C.A. § 300gg-13(a)(4) (West 2013) (requiring group health insurance plans to contain provisions satisfying the terms of the Mandate).

employer that purchases the plan for the benefit of its employees. No burden is imposed directly upon the owners of the employer.[215] Between the shareholders and the corporation's purchase of a group health insurance plan complying with the Mandate is the election of the board of directors, the board's decision to maintain an employee group health insurance plan, the board's designation of corporate officers, an officer executing the group health plan agreement on behalf of the corporation, and the corporation paying for the plan with its funds and perhaps with contributions from the employee-participants. At this juncture there has been no conduct that can conceivably give rise to a shareholder complaint; no shareholder has been involved in any action, no shareholder assets have been expended,[216] and no person has acquired any contraceptive drug, device, or procedure through the

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[215] *See*, *e.g.*, Korte v. Sebelius, 735 F.3d 654, 715 (7th Cir. 2013) (Rovner, J., dissenting) ("[T]he Kortes and the Grotes bear no personal obligation to pay for the coverage."); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 409 (3d Cir. 2013) ("Since Conestoga is distinct from the Hahns, the Mandate does not actually require *the Hahns* to do anything."), *cert. granted*, 134 S. Ct. 678 (2013); Eden Foods, Inc. v. Sebelius, No. 13-1677, 2013 U.S. App. LEXIS 15807 (6th Cir. June 28, 2013) ("Moreover, the burden Potter claims is too attenuated. The contraceptive mandate is imposed on Eden Foods, not Potter."); Mersino Mgmt. Co. v. Sebelius, No. 13-cv-11296, 2013 WL 3546702, at *11 (E.D. Mich. July 11, 2013) ("Karen and Rodney Mersino, who are not required individually to comply with the regulations, do not suffer actual injury (they incur no out of pocket costs as individuals) from the contraceptive coverage mandate that would imbue them with Article III standing to challenge the regulations separate and apart from the corporate entity that is required to comply with the regulations."); Eden Foods, Inc. v. Sebelius, 733 F.3d 626, 632 (6th Cir. 2013) ("The Affordable Care Act's contraceptive mandate imposes duties and potential penalties upon Eden Foods only, not upon Potter, despite his status as the sole shareholder of the corporation."). When the employer is self-insured, the attenuation between the shareholder and the insurance provider is reduced by one degree, but the fact remains that it is the corporation—a jural entity separate and distinct from the shareholders—that shoulders the burden. *See* Gilardi v. Sebelius, 926 F. Supp.2d 273, 283-84 (D.D.C. 2013). *See also* Oral Argument, Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208 (D.C. Cir. 2013) (No. 13–1144) ("[F]or 200 years no corporation or sole shareholder has ever obtained an exemption from any form of regulation on the theory that's being urged here, which is that you pass through the corporation and treat corporate regulations as if it were regulation of the CEO or controlling shareholder."). *But see* Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1217 (D.C. Cir. 2013) ("The burden on religious exercise does not occur at the point of contraceptive purchase; instead, it occurs when a company's owners fill the basket of goods and services that constitute a healthcare plan.").

[216] *See also Conestoga Wood*, 724 F.3d at 388 ("[I]t is Conestoga that must provide the funds to comply with the Mandate—not the Hahns.").

corporate-maintained health insurance plan. Rather, it will not be until a beneficiary of the plan (who may not be an employee of the plan sponsor and may not share the religious beliefs of the corporation's shareholders)[217] purchases the contraceptive drug, device, or procedure, often in consultation with a physician,[218] and either submits the invoice or seeks reimbursement from the insurer that there will be even a tenuous relationship between the shareholder and the asserted sinful conduct.

The attenuated connection between a shareholder's religious views and the act of a plan beneficiary engaging in entirely legal conduct precludes both standing to assert a Free Exercise right and showing a significant burden.[219] Nothing done by the shareholders is implicated in the decision to provide an

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[217] The Peace of Augsburg's principle *cuius regio, eius religio* does not apply in American corporate law to bind the employees to the religious views of the corporation's shareholders. *See Germany, Religious War and the Power of Augsburg*, ENCYCLOPAEDIA BRITANNICA, *available at* http://www.britannica.com/EBchecked/topic/231186/Germany (last visited Jan. 12, 2014).

[218] For example, Plan B is available without a physician's involvement, but daily birth control pills require a prescription.

[219] *See* Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb-1(a) (West 2013) ("Government shall not substantially burden a person's exercise of religion ...."); O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012) ("RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own."); Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,887 (July 2, 2013) ("And even if the accommodations were found to impose some minimal burden on eligible organizations, any such burden would not be substantial for the purposes of RFRA because a third party pays for the contraceptive services and there are multiple degrees of separation between the eligible organization and any individual's choice to use contraceptive services. ... [W]hether such services will be utilized is the result of independent choices by employees or students and their dependents, who have distinct interests and may have their own religious views that differ from those of the eligible organization."). *See also* Corbin, *The Contraception Mandate*, *supra* note 128, at 157–60. In this respect, the Mandate resembles the "released time" program considered and approved over a Free Exercise challenge in *Zorach v. Clauson*, 343 U.S. 306, 306, 308 (1952). Under this program, public school students were permitted to leave the school premises to attend religious instruction during the school day. In response to a Free Exercise challenge, the Court wrote:

> [i]t takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any.

Id. at 311.

employee health insurance plan that complies with the Mandate or in the decision by someone to utilize Mandate-covered goods or services.[220]

Further, these shareholders profess that merely permitting the corporation to provide insurance coverage for contraception, they are forced to facilitate conduct they believe to be sinful and proscribed.[221] This position is without merit. Illustrative for these purposes is the Supreme Court's decision in *Zelman v. Simmons-Harris*,[222] wherein a challenge was brought to certain government funded school vouchers that were applied almost exclusively to religious schools.[223] The opponents of the program argued that the voucher program violated the Establishment Clause[224] by signaling governmental endorsement of religion[225] in facilitating religious teaching by

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[220] Some of those objecting to the Mandate have sought to shorten the chain of attenuation by focusing not upon the ultimate utilization of the benefit but rather upon its prior funding. *See*, *e.g.*, Oral Argument at 6:58, 7:23, Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013), *available at* http://media.ca7.uscourts.gov/sound/2013/lj.12-3841.12-3841_05_22_2013.mp3 ("Here, the Kortes' specific objection is not just the facilitation. It's the arranging for, paying for, subsidizing, providing and facilitating.... It's having to pick up the phone and call the insurance company to say, 'Send us a policy and a contract that provides this coverage.'"); Complaint ¶ 10, Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. April 30, 2012) (No. 1:12-cv-1123). *See also* Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1217 ("The burden on religious exercise does not occur at the point of contraceptive purchase; instead, it occurs when a company's owners fill the basket of goods and services that constitute a healthcare plan."). These efforts fail to account for the numerous still-extant steps between the shareholders and the action of the corporation's officers to implement a group health care policy.

If shareholders are permitted to object to the corporate group health insurance plan's coverage of goods and services they consider sinful, there is no clear reason those same shareholders cannot prevent the employees from using other compensation (hourly wages, salary, and bonuses) to pay directly for contraceptives, alcoholic beverages (*see Global Survey of Evangelical Protestant Leaders*, PEW RESEARCH CENTER 45 (June 22, 2011)), or tobacco. *See also* Corbin, *Debate*, *supra* note 128, at 271. The plurality in *Hobby Lobby* indicated that such conduct would not amount to a violation of the government's compelling interest in the uniform enforcement of labor laws. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1141 n.16. (10th Cir.), *cert. granted*, 134 S. Ct. 678 (2013). This assertion begs the question of why is the uniform application of the Mandate to all for-profit ventures with fifty or more employees not a compelling government interest?

[221] *See Korte*, Oral Argument, *supra* note 220; *Newland*, Complaint, *supra* note 220, at ¶ 32.

[222] 536 U.S. 639 (2002).

[223] *Id.* at 647 (stating that ninety-six percent of voucher recipients utilized them at religious schools).

[224] *Id.* at 648.

[225] *Id.* at 654.

funding proselytization.[226] Rejecting both of these claims, the Court held that any religious conduct could not be attributed to the state consequent to the attenuated link between funding the venture and the ultimate disbursement of the related funds. Rather, there were intervening independent acts, namely the decision by a voucher-holder to utilize it at a religious institution.[227] Therefore, it was not the state that decided to fund and endorse a religious institution, but rather individuals making a free decision with the voucher provided to them. That intervening individual election broke any linkage between state action and religious conduct for purposes of the Establishment Clause.[228] Admittedly this analysis concerns rights guaranteed by the Free Exercise Clause rather than the Establishment Clause, but there is no analytic basis for a distinction. A Free Exercise "burden" may be used as a proxy for an Establishment "excessive entanglement."[229] More directly on point, and squarely acknowledging that attenuation invalidates a claim of Free Exercise burden, is *Goehring v. Brophy*,[230] in which certain students objected, on Free Exercise grounds, to a university registration fee utilized in part to fund student health insurance that covered abortion.[231] That claim was rejected on the basis that, due to attenuation, there was no burden on Free Exercise.[232]

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[226] *Id.* at 649.

[227] *Id.* at 649–53.

[228] *See* Mitchell v. Helms, 530 U.S. 793 (2000); City of Boerne v. Flores, 521 U.S. 507, 508–09 (1997) (finding the RFRA unconstitutional as applied to state action); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 9 (1993); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986) ("[A]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."); Mueller v. Allen, 463 U.S. 388, 399 (1983) ("It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children. It is also true, however, that under Minnesota's arrangement public funds become available only as a result of numerous private choices of individual parents of school-age children.").

[229] *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[230] 94 F.3d 1294 (9th Cir. 1996), *overruled on other grounds by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[231] *See id.* at 1298 ("The plaintiffs in the present case, undergraduate and graduate students, object to subsidizing the cost of abortions through their student registration fee subsidy. The plaintiffs allege that their sincerely held religious beliefs prevent them from financially contributing to abortions, and therefore, the student subsidy violates their right to free exercise of religion under the First Amendment.").

[232] *Id.* at 1300 ("Moreover, the student health insurance subsidy is not a substantial sum of money and the subsidy, taken from registration fees, is distributed only for those students

Suggestions that either (1) shareholder funds pay for a Mandate-compliant insurance policy or (2) the penalties imposed for non-compliance with the Mandate[233] are extracted from shareholders are without merit. Both plan costs and penalties are liabilities of the corporation; no shareholder is liable thereon. The funds used to satisfy those obligations are corporate property, not assets of the shareholders.[234] These facts are not altered if the corporation elects to be a Small Business Corporation (S-corp).[235] The same principles apply as well to LLCs.[236]

CONCLUSION

> "I DIDN'T APPROVE ANY SHIPMENT." "THEN YOUR COMPANY DID." "I'M NOT MY COMPANY."[237]

While drawn from a movie about a comic book character, these words sum up a crucial dogma of the law of business organizations, namely that the corporation and its owners are legally distinct from one another. It is not doubted that the shareholders, most often Roman Catholic, of the various for-profit business ventures that have brought challenges to the Mandate have sincerely held religious based objections to the goods and services that the Mandate requires as benefits under group insurance plans. Those same shareholders have failed, however, to understand that they are not the corporation and the corporation is not them. Rather, the shareholders are legally distinct persons, and the corporation, as a legal person, has of itself no religious faith

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who elect to purchase University insurance. Furthermore, the plaintiffs are not required to accept, participate in, or advocate in any manner for the provision of abortion services.").

[233] *See supra* notes 36–39 and accompanying text.

[234] *See supra* notes 86, 92 and accompanying text.

[235] Under the S-corp system, the taxes imposed upon corporate activities are satisfied by the shareholders. It remains, however, that S-corp shareholders enjoy limited liability, the usual rules of agency control, the determination of corporate policy remains with the board of directors, and the corporation's assets remain its own. *See also* Korte v. U.S. Dep't of Health & Human Servs., 912 F. Supp. 2d 735, 742 n.11 (S.D. Ill. 2012) (quoting ROBERT R. KEATINGE & ANN E. CONAWAY, KEATINGE AND CONAWAY ON CHOICE OF BUSINESS ENTITY: SELECTING FORM AND STRUCTURE OF THE CLOSELY HELD BUSINESS § 14:2 (2012)); *supra* notes 77–105 and accompanying text. *But see* Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1225 (D.C. Cir. 2013) (Randolph, J. concurring) (noting that "Subchapter S disregards the corporate form for purposes of the corporate income tax" and arguing that as the Mandate is enforced by means of the tax code, its impositions should be considered as being imposed upon the shareholders).

[236] *See, e.g.*, *supra* notes 84, 86.

[237] IRON MAN (Paramount Pictures 2008).

or beliefs.[238] Although a court may not second-guess an individual's assessment of what is required of them by sincerely held religious beliefs,[239] a court may look to a religion's objective faith pronouncements to assess whether a corporation or other legal construct can practice that religion on its own account.[240] On that basis, a court should conclude that a corporation has no Free Exercise rights and, therefore, no rights under RFRA. It necessarily follows that the Mandate does not violate the corporation's religious views.

As to the religious beliefs of the shareholders, while they may personally determine to avoid the drugs and procedures required to be covered by the Mandate, their personal views in no manner inform the corporation's obligation to comply with applicable law. The legal reality is that the Mandate imposes no obligation upon the shareholders of these ventures. For any number of reasons, the owners of the corporations now challenging the Mandate chose to organize business ventures in the corporate form. There resulted from that election a wide variety of consequences, including the rule that the actions of the corporation are those of a legally recognized person distinct from the shareholders either individually or collectively. Those legal consequences cannot be selectively ignored to create an objection to the Mandate where one would otherwise not exist.

The venerable principle *damnum absque injuria*[241] is applicable here. The Mandate imposes no obligation that of itself gives rise to a legally cognizable injury to any of the plaintiffs objecting to the Mandate; the

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[238] *See* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 388 (3d Cir.) ("[A] for-profit, secular corporation cannot engage in the exercise of religion."), *cert. granted*, 134 S. Ct. 678 (2013). *But see* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, at *1135 (10th Cir.) (stating that Hobby Lobby, as a corporation, exercises its religion through proselytizing), *cert. granted*, 134 S. Ct. 678 (2013).

[239] *Conestoga*, 724 F.3d at 408.

[240] *Id*.

[241] In *Ala. Power Co. v. Ickes*, 302 U.S. 464, 479 (1938), the U.S. Supreme Court ruled:

> The term "direct injury" is there used in its legal sense, as meaning a wrong which directly results in the violation of a legal right. "An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without an injury in this sense (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain.... Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action." The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained.

(citation omitted).

entity owners are not subject to the Mandate and the entities have no Free Exercise right impacted by compliance therewith. The corporations and LLCs purchasing the insurance policies with Mandate-required benefits bear no ill effect therefrom, and the ability of the owners to personally promote the message that contraception and abortion are morally abhorrent by way of contributions and underwriting is not restricted.[242]

The corporate challenges to the Mandate fail as a matter of the law of business entities, and on that basis they should be dismissed.

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[242] *See, e.g.*, Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1237 (D.C. Cir. 2013) (Edwards, J., dissenting):

> There are three reasons why the Mandate does not *substantially* burden the Gilardis' "exercise of religion." First, the Mandate does not require the Gilardis to use or purchase contraception themselves. Second, the Mandate does not require the Gilardis to encourage Freshway's employees to use contraceptives any more directly than they do by authorizing Freshway to pay wages. Finally, the Gilardis remain free to express publicly their disapproval of contraceptive products.